No. 02-575-CSX Title: Nike, Inc., et al., Petitioners
v.
Marc Kasky

Docketed: October 16, 2002 Court: Supreme Court of California

Entry	Date	Proceedings and Orders
	Oct 16 2002	Petition for writ of certiorari filed. (Response due November 15, 2002)
	Oct 16 2002	LODGING consisting of twenty bound copies of related material received from counsel for the petitioners.
	Nov 12 2002	Motion of Pacific Legal Foundation, et al. for leave to file a brief as amici curiae filed.
	Nov 15 2002	Brief of respondent Marc Kasky in opposition filed.
	Nov 15 2002	Motion of Council of Public Relations Firms, et al. for leave to file a brief as amici curiae filed.
	Nov 15 2002	Motion of ExxonMobil, et al. for leave to file a brief as amici curiae filed.
	Nov 15 2002	Motion of Center for Advancement of Capitalism for leave to file a brief as amicus curiae filed.
	Nov 15 2002	Motion of Civil Justice Association of California for leave to file a brief as amicus curiae filed.
	Nov 15 2002	Motion of Thirty-Two Leading Newspapers, Magazines, etc., et al. for leave to file a brief as amici curiae filed.
	Nov 15 2002	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae filed.
	Nov 15 2002	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.
	Nov 15 2002	Motion of Center for Individual Freedom for leave to file a brief as amicus curiae filed.
	Nov 26 2002	DISTRIBUTED for Conference of December 13, 2002
	Nov 26 2002	Reply brief of petitioners Nike, Inc., et al. filed.
	Jan 6 2003	REDISTRIBUTED for Conference of January 10, 2003
	Jan 10 2003	Motion of Pacific Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 10 2003	Motion of Council of Public Relations Firms, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 10 2003	Motion of ExxonMobil, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 10 2003	Motion of Center for Advancement of Capitalism for leave to file a brief as amicus curiae GRANTED.
	Jan 10 2003	Motion of Civil Justice Association of California for leave to file a brief as amicus curiae GRANTED.
	Jan 10 2003	Motion of Thirty-Two Leading Newspapers, Magazines, etc., et al. for leave to file a brief as amici curiae GRANTED.
	Jan 10 2003	Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Jan 10 2003	Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED.
	Jan 10 2003	Motion of Center for Individual Freedom for leave to file a brief as amicus curiae GRANTED.

Entry	Date	Proceedings and Orders
	Jan 10 2003	Petition GRANTED. SET FOR ARGUMENT April 23, 2003. **********
	Feb 3 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners, Nike, et al.
	Feb 14 2003	Consent to the filing of any and all amicus briefs in support of either party received from counsel for the respondent.
	Feb 20 2003	Order extending time to file petitioners' brief on the merits to and including February 28, 2003. Order extending time to file respondent's brief on the merits to and including April 4, 2003.
	Feb 24 2003	Brief amici curiae of American Civil Liberties Union and ACLU of Northern CA filed.
	Feb 27 2003	Brief amicus curiae of Mountain States Legal Foundation filed.
	Feb 27 2003	Brief amicus curiae of AFL-CIO in support of neither party filed.
	Feb 28 2003	Brief of petitioners Nike, Inc., et al. filed.
	Feb 28 2003	Brief amici curiae of Defenders of Property Rights, et al. filed.
	Feb 28 2003	Brief amicus curiae of National Association of Manufacturers filed.
	Feb 28 2003	Brief amicus curiae of Pfizer Inc. filed.
	Feb 28 2003	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Feb 28 2003	Brief amici curiae of ExxonMobil, et al. filed.
	Feb 28 2003	Brief amici curiae of SRiMedia and CoreRatings filed.
	Feb 28 2003	Brief amicus curiae of Business Roundtable filed.
	Feb 28 2003	Brief amici curiae of Arthur W. Page Society, et al. filed.
	Feb 28 2003	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Feb 28 2003	Brief amicus curiae of Civil Justice Association of California filed.
	Feb 28 2003	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Feb 28 2003	Brief amicus curiae of Center for Advancement of Capitalism filed.
	Feb 28 2003	Brief amici curiae of Forty Leading Newspapers, ABC, et al. filed.
	Feb 28 2003	Brief amicus curiae of Liability Advisory Council, Inc. filed.
	Feb 28 2003	Brief amicus curiae of United States filed.
	Feb 28 2003	Brief amici curiae of Association of National Advertising, Inc., et al. filed.
	Feb 28 2003	Brief amicus curiae of Center for Individual Freedom filed.
	Feb 28 2003	Brief amici curiae of Thos.Jefferson Cntr.for Protection of Free Expression et al. filed.
	Mar 4 2003	LODGING consisting of twenty bound copies of related material received from counsel for amici Assn. Natl. Advertising, et al.
	Mar 6 2003	Motion of petitioners to dispense with printing the joint appendix filed.
	Mar 6 2003	LODGING consisting of twenty bound copies of reprinted Oct.16th lodging,now entitled Petitioner's Second Lodging received from counsel for the petitioner
	Mar 7 2003	CIRCULATED.
	Mar 19 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 24 2003	Motion of petitioners to dispense with printing the joint appendix GRANTED.
	Mar 28 2003	Record filed.
	Apr 2 2003	Letter from counsel for the petitioners received and distributed.
	Apr 3 2003	Brief amicus curiae of Public Citizen filed.
	Apr 4 2003	Brief amicus curiae of Consumer Attorneys of California filed.
	Apr 4 2003	Brief amici curiae of Sierra Club, et al. filed.
	Apr 4 2003	Brief of respondent Marck Kasky on behalf of General Publ. of California filed.
	Apr 4 2003	Brief amicus curiae of ReclaimDemocracy.Org. filed.
	Apr 4 2003	Brief amicus curiae of National Association of Consumer Advocates filed.
	Apr 4 2003	Brief amicus curiae of Campaign Legal Center filed.
	Apr 4 2003	Brief amicus curiae of Global Exchange filed.
	Apr 4 2003	Brief amici curiae of Members of the United States Congress, et al. filed.
	Apr 4 2003	Brief amici curiae of Domini Social Investments LLC, et al. filed.
	Apr 4 2003	Brief amici curiae of California, et al. filed.
	Apr 7 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 16 2003	Letter from counsel for petitioners received and DISTRIBUTED.
	Apr 16 2003	Reply brief of petitioners Nike, Inc., et al. filed.
	Apr 23 2003	ARGUED.

No. 02-575-CSX

Supreme Court, U.S.
FILED

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No. 02-___

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY.

On Petition for a Writ of Certiorari
to the Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Philip Knight; Thomas Clarke; Mark Parker; and David Taylor.

RULE 29.6 STATEMENT

Petitioner Nike, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

RULE 29.4(C) CERTIFICATION

Petitioner certifies that 28 U.S.C. 2403(b) may apply and that this Petition has been served upon the Attorney General of California.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nike, Inc., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of California in this case.

OPINIONS BELOW

The opinion of the Supreme Court of California (Pet. App. 1a-64a) is published at 45 P.3d 243. The opinion of the Court of Appeal of California (Pet. App. 66a-79a) is published at 93 Cal. Rptr. 2d 854. The orders of the Superior Court granting petitioners' demurrer and dismissing the complaint (Pet. App. 80a-81a) are unpublished.

JURISDICTION

The Supreme Court of California denied rehearing (Pet. App. 82a) on July 31, 2002. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." The relevant provisions of California law are reproduced in the appendix (at 83a-88a).

STATEMENT OF THE CASE

Respondent brought this suit against petitioners asserting violations of California unfair trade practice and false advertising law. At every stage of the proceedings, Nike argued that the complaint must be dismissed under the First Amendment. See S. Ct. R. 14.1(g)(i); Pet. Demurrer 7-12; Pet. Cal. C.A. Br. 17-31; Pet'r Cal. S. Ct. Br. 7-47. The superior court and court of appeal agreed. But the California Supreme Court reversed in a four-to-three decision, holding that petitioners' speech is actionable under state law and receives *no* protection under the First

Amendment to the extent it is false or misleading. A strong dissent urged this Court to grant certiorari.

1. Petitioner Nike is the world's leading athletic apparel and equipment manufacturer. It has also been made the principal focus of the passionate world-wide debate over "globalization" – *viz.* the conditions under which multinational companies invest in developing economies. Nike's goods are produced by subcontractors with some 500,000 employees at roughly 736 facilities in fifty-one countries. Beginning in 1995, Nike was the target of allegations that, at its facilities in Southeast Asia, conditions were dangerous, workers were mistreated and underpaid, and child labor was being utilized. Those assertions quickly generated enormous media scrutiny and editorial commentary, much of it pointed and vituperative.

The upshot of these charges was not that Nike's products were themselves inferior, overpriced, or harmful, but rather that it was an immoral company, generating great profits on the backs of Third-World labor. These allegations were part and parcel of a larger debate over the degree to which multinational investment should be regulated and the pace at which it should occur. And in almost every instance, the allegations against Nike were held out as supposedly typifying corporate failure to adhere to ethical standards of conduct. Around this country, and around the world, there were calls for boycotts, demands for legislative action, and a broad effort to bring the heavy weight of moral opprobrium down on the shoulders of Nike and its employees.

Nike soon found itself responding on a daily, and even hourly, basis to claims that it was operating sweatshops in supposedly slave-labor conditions.[1] Its representatives were regularly deluged by press inquiries for comments on news reports

[1] A number of examples are included in the more than 250 pages of exhibits to respondent's Complaint, which petitioner is lodging with this Court. See Pet. Lodging (First Amended Complaint of Milberg, Weiss, Bershad, Hynes & Lerach LLP for Marc Kasky versus Nike, Inc., *et al.* (July 2, 1998)) (hereinafter "Compl.").

scheduled to be published immediately. Although some independent news organizations concluded that some allegations against Nike had merit, former United Nations Ambassador Andrew Young concluded in an independent review commissioned by Nike that the charges were largely false. Nike then purchased "editorial advertisements" – *i.e.*, paid political advertisements (see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964) (affording such expression the full protection of the First Amendment)) – to report that finding. Nike officials also responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and letters to officers of major national universities.

These various statements conveyed the view that Nike *does* act morally because its investments produce substantial economic and political benefits for its workers and because employees of its contract facilities are paid fairly and treated well. Although some of Nike's statements recognized that ethical issues are relevant to consumers' purchasing decisions, none appeared in advertising of its products or urged consumers to buy those products.

2. Respondent Marc Kasky, identifying himself only as a California resident, brought this suit against Nike and a number of its employees who had spoken about globalization on the company's behalf, alleging that their statements were "false" or amounted to "misrepresentations." *E.g.*, Compl. ¶ 75. Respondent pointedly "alleges no harm or damages whatsoever regarding himself individually" – such as that he had read a single one of the statements at issue, much less that he had been induced to purchase any Nike product or injured in any way as a result. *Id.* ¶ 8. Respondent also disclaims any "personal knowledge" of the facts underlying his own case (other than that he lives in California, which is his sole qualification to bring the suit). *Id.* ¶ 3. Respondent has thus appointed himself as a "private attorney general" acting "on behalf of the General Public of the State of California." *Id.* ¶ 8.

The allegations of the complaint fit a consistent pattern. Respondent invokes some third party's statement about supposedly poor conditions at a particular Nike contract facility, notes

Nike's denial, and flatly asserts that the former is true and the latter false, notwithstanding that the complaint disclaims any personal knowledge of the actual facts. Some of the charges are contained in press reports, while others are made by advocacy groups. Thus the complaint repeatedly invokes (and reproduces as Exhibit E) a "report provided by Thuyen Nguyen, of Vietnam Labor Watch," stating that this individual "spoke to 35 workers individually and at length" who reported poor and dangerous working conditions and low pay. See also, *e.g.*, Compl. ¶ 48 & Exh. AA (repeating claims contained in "a newspaper entitled *Thanh Nien* and translated by Vietnam Labor Watch"). The complaint dismisses Nike's responses to these allegations as "false" and as amounting to "misrepresentations." *E.g.*, *id.* ¶ 75.

On this basis, the complaint asserts causes of action under California unfair trade practice and false advertising law. The former creates a private right of action to remedy "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" California's false advertising law. Cal. Bus. & Prof. Code 17200, 17203. The latter makes a criminal misdemeanor, and creates a private right of action to remedy, any statement "which is untrue or misleading" and is made or disseminated "before the public in this state * * * in any newspaper or other publication * * * or in any other manner or means whatever." *Id.* §§ 17500, 17535. Although respondent Kasky at some points alleges that petitioners spoke negligently (*e.g.*, Compl. ¶ 77), the statutes he invokes impose "strict liability": even non-negligent misstatements are actionable, and even *truth* is not a defense where the truthful statements are deemed misleading. *Cortez* v. *Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 717 (Cal. 2000) (unfair trade practices); *Chern* v. *Bank of Am.*, 544 P.2d 1310, 1316 (Cal. 1976) (false advertising).

The complaint does not contend that listeners considered petitioners' statements only for the purpose of making purchasing decisions: Kasky's theory is that Nike's statements, "although addressed to the public generally, were *also* intended to reach and influence actual and potential purchasers of Nike's products." Pet. App. 21a (emphasis added). Although respondent

claims no personal injury and therefore seeks no damages for himself, he seeks legal fees, the costs of the suit, and orders requiring Nike to disgorge all monies it earned in California as a result of its allegedly unlawful conduct, as well as "a Court-approved public information campaign to correct" its alleged misstatements, and to enjoin future misrepresentations regarding "working conditions under which NIKE products are made including, but not limited to, wages, hours, overtime, environmental, health and/or safety conditions, and the use of child labor." Compl. at 34.

3. Respondent Kasky freely concedes that, if the statements by petitioners underlying his complaint are anything other than "commercial speech," then the case must be "resolved in Nike's favor, and the statements are immune from state regulation." Resp. Cal. S. Ct. Br. 1. He thus does not contend that the application of the causes of action he asserts to these facts could survive rigorous First Amendment scrutiny. Nor does he contend that petitioners ever spoke with "actual malice" (*i.e.*, with reckless disregard for the truth) or that he could make out a claim for fraud, deceit, or libel. Petitioners accordingly moved to dismiss the suit as barred by the First Amendment.

a. The superior court agreed (see Pet. App. 81a (order)) and, on respondent's appeal, the California Court of Appeal unanimously affirmed (see *id.* 66a-79a). The court of appeal explained that petitioners' speech is not "commercial" because it "cross[es] the boundary between political and private decision-making": "citizens may want to translate personal discontent over Nike's labor practices into political action or may merely wish to refrain from purchasing its products." *Id.* 78a. Further, "[t]he fact that Nike has an economic motivation in defending its corporate image from such criticism does not alter the significance of the speech to the '*listeners*' – the consumers or other members of the public concerned with labor practices attending the process of economic globalization." *Id.* 78a-79a (citing *Linmark Assocs.* v. *Willingboro*, 431 U.S. 85, 92 (1977)) (emphasis added).

b. The California Supreme Court granted review – accepting respondent Kasky's assertions that the case presented par-

ticularly "important constitutional issues" (Resp. Pet. for Rev. 1) and a pure question of law (*id.* 16) – and reversed. Assuming the truth of respondent's allegations for purposes of its decision, the four-Justice majority first set out the conspicuously "broad" terms of California unfair trade practice and false advertising law, which it concluded encompass Nike's statements, notwithstanding that those statements were not made in product advertisements and included no product references. See generally Pet. App. 5a-7a. The majority then framed the dispositive constitutional issue as whether those statements constitute "commercial speech," reasoning that this Court has held that the First Amendment provides no protection to, and leaves the states free to ban, "commercial speech that is false or actually or inherently misleading." *Id.* 13a.

The majority adopted a three-part test applicable to the context of unfair trade practice and false advertising claims: "Commercial speech" is defined by the California court as statements (i) made by persons "engaged in commerce," (ii) to an audience that includes "actual and potential purchasers," (iii) in the form of "representations of fact of a commercial nature" such as "factual representations about its own business operations." Pet. App. 21a-22a. The majority opined that each of these elements is "implicit in" U.S. Supreme Court precedent, which concededly had never articulated such a test. *Id.* 18a. The majority also reasoned that this case was not controlled by this Court's landmark holdings in *Thomas* v. *Collins*, 323 U.S. 516 (1945), and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), that statements in the course of a labor dispute are entitled to full First Amendment protection because this case involves only the regulation of "false or misleading speech" and because those decisions in any event have been *sub silentio* superceded by "the modern commercial speech doctrine." Pet. App. 24a.

The majority further made clear that, on its view, commercial speech includes not merely statements made directly to the public, but also statements made to "persons (such as reporters or reviewers) likely to repeat the message or to otherwise influence actual buyers or customers." Pet. App. 44a. And it makes no difference that, in speaking, the business had "a secondary

purpose to influence lenders, investors or lawmakers" (*id.* 28a), for "[s]peech is commercial in its content [so long as] it is *likely* to *influence* consumers in their commercial decisions" (*id.*) (emphases added).

The majority held that Kasky's allegations described commercial speech under this standard, making petitioners' statements actionable if false or misleading. "Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." Pet. App. 23a. As supposedly false or misleading commercial speech, moreover, Nike's speech "receives *no* protection under the First Amendment, and therefore a law that prohibits only such unprotected speech *cannot violate constitutional free speech provisions*." *Id.* 27a (emphases added). The court accordingly remanded for a determination "whether any false representations were made." *Id.* 2a.

c. Three Justices dissented in two lengthy and vigorous opinions. Emphasizing the ongoing public debate over globalization, Justices Chin and Baxter reasoned that, "irrespective of Nike's economic motivation, the public has a right to receive information on matters of public concern." Pet. App. 32a (title). See also *id.* 33a ("The public at large, in addition to Nike's actual and intended customers, has the right to receive information from both sides of this international debate."). On the majority's contrary holding, "Nike's critics have taken full advantage of their right to 'uninhibited, robust, and wide-open' debate, [but] the same cannot be said of Nike, the object of their ire," solely because "Nike competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods." *Id.* 31a (quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964)). "Handicapping one side in this important worldwide debate," those dissenters explained, "is both ill considered and unconstitutional" under this Court's precedents. *Id.* 31a. See generally *id.* 33a-39a (discussing cases).

Justice Brown dissented separately, urging this Court to grant certiorari either to reject the California Supreme Court's departure from precedent or to begin the process of reformulating the commercial speech doctrine. The majority's approach, she explained, "flouts the very essence" of this Court's commercial speech precedents by essentially deeming the existence of a corporate speaker dispositive, "stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues." Pet. App. 45a. And the majority's bizarre contention that Nike's statements are "commercial speech" under its definition if they are false or misleading "betrays a fundamental misunderstanding of the issue presented" and "makes no sense": "Indeed, the majority begs the question by making false or misleading corporate speech commercial speech because it is false or misleading." *Id.* 60a.

Alternatively, Justice Brown urged this Court to revise its assumption "that all commercial speech is the *same* under the First Amendment" (Pet. App. 41a) (emphasis in original)), a view that fails to account for the increasing "intersection between commercial speech and various forms of noncommercial speech, including scientific, political and religious speech, [which] abound." *Id.* 42a. "As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the forces of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity." *Id.* 61a. Concluding that "the commercial speech doctrine needs and deserves reconsideration and [that] this is as good a place as any to begin," she "urge[d] the high court to do so here." *Id.* 64a.

4. The California Supreme Court denied rehearing (Pet. App. 82a), and this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari should be granted for three reasons. First, the California Supreme Court's decision flatly conflicts with this Court's precedents defining the limited

class of "commercial speech" that receives less than the full protections of the First Amendment. Second, the scheme of liability approved by the majority below cannot be reconciled with this Court's decisions prohibiting viewpoint discrimination by government – here, discrimination in favor of speech critical of commercial activity and against statements made by businesses in response – as well as its precedents holding that even commercial speech is fully protected when "inextricably intertwined" with noncommercial speech. Finally, it is essential that certiorari be granted now because nothing that can occur on remand will either illuminate the constitutional questions presented or alleviate the seriously adverse effects that the California Supreme Court ruling has on core free speech and on the public's access, through newsgathering by the media and otherwise, to speech vital to informed decisionmaking.

I. Certiorari Is Warranted To Review The California Supreme Court's Holding That Statements On Matters Of Public Interest That Could Influence Consumers' Purchasing Decisions Constitute "Commercial Speech."

The California Supreme Court's holding that businesses may be held strictly liable for misstatements they may make regarding issues of social importance conflicts with this Court's precedents. These conflicts are not minor errors of nuance or emphasis in the application of a jurisprudence that, perhaps of necessity, lacks the sharpest of definitional boundaries. This is not a close case. Whatever the exact margins of the category of "commercial speech" subject to lesser First Amendment protection, the statements at issue here fall well outside them.

The majority below reasoned that the public relies on corporations' statements about their operations to make not only ethical and political choices, but also *economic* decisions. This Court has already rejected attempts to extend the definition of "commercial speech" so far. It is settled that the full protections of the First Amendment apply except in the limited circumstance that speech – generally in the form of advertising – is intrinsically tied to a commercial transaction within the government's traditional power to regulate. Discussion of "public issues," by contrast, "occupies the 'highest rung of the hierarchy of First

Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983). Certiorari should be granted to resolve the conflict.

A. The Decision Below Conflicts With This Court's Precedents Defining Commercial Speech.

1. The California Supreme Court held in this case that businesses' statements on issues of great public importance are "commercial speech" whenever they may influence consumers' buying decisions. The lower court thus adopted a theory of "ethical purchase behaviour" – *viz.* that in some instances purchasing by consumers turns not on the listener's views of the price or quality of the product but on a "*moral* judgment" about the corporate speaker. N. Craig Smith, MORALITY AND THE MARKET: CONSUMER PRESSURE FOR CORPORATE ACCOUNTABILITY 177 (1990) (emphasis added). The court accordingly held it immaterial whether the speech at issue appears on a product label, in a Nike catalog, on a billboard advertising shoes, or instead in a *New York Times* op-ed on one of the burning social issues of the day, because any of those is ultimately capable of affecting consumers' conclusions about the corporate speaker and thus shaping consumers' actions in the marketplace.

That theory goes beyond just uncomfortably constricting the breathing room for speech – it literally takes one's breath away. Petitioners' speech addresses the hotly debated issue of globalization, and many of their statements appeared in classic fora for protected speech – newspaper editorials and articles. Petitioners spoke not about the price and quality of products but about whether Nike is an ethical company. They responded to allegations that Nike's investment in the developing economies of Southeast Asia had produced dangerous and unconscionable working conditions. These accusations carried with them explicit and implied calls for boycotts of Nike products. Some newspaper editorials asked, "who wants to enjoy products made on the backs of human misery?" (Compl. Exh. J), while other accusers employed "such caustic and scathing words as 'slavery' and 'sweatshop'" (Pet. App. 30a (Chin, J., dissenting)).

In response, petitioners argued that Nike's investments are "helping to build economies, provide skills, and create a brighter future for millions of workers around the world." Compl. Exh. R. On Nike's view, "History shows that the best way out of poverty for [developing] countries is through exports of light manufactured goods that provide the base for more skilled production." *Id.* Exh. DD (letter from petitioner Philip Knight to *The New York Times*). Nike also expressed its understanding that the facts alleged against it were false: that, for example, it paid a living wage and that its subcontractors provided other benefits as well. *Id.* Exh. Z; see also *id.* Exh. P.

2. This Court has articulated three tests for identifying "commercial speech." See generally *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993). Petitioners' statements cannot be characterized as commercial speech under any of these formulations, and not even the majority below seriously contended to the contrary:

- In its recent decisions, the Court has "usually defined [commercial speech] as speech that does no more than propose a commercial transaction." *United States* v. *United Foods*, 533 U.S. 405, 409 (2001). See also, *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2421 (2001); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). Petitioners' statements obviously did not "propose a commercial transaction" in any respect. Their editorials, comments to reporters, and even direct communications to consumers neither discussed particular products nor addressed the price or quality of the Nike line of goods. Particularly given that this Court has described the inquiry whether speech invited a commercial transaction as "*the test* for identifying commercial speech" (*Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989) (emphasis added)), the conflict between the decision below and this Court's precedents is plain.

- In *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), which involved advertisements that were combined with discussion of social issues, this Court concluded that statements could properly be characterized as commercial speech on the basis of three factors in "combination": (1) advertising format; (2) reference to a specific product; and (3) the

speaker's economic motivation. Petitioners' speech lacks either of the first two of these characteristics: they were in public statements such as editorials, not advertisements; and they made no mention of a product. The California Supreme Court's holding that the third factor – that the speaker acts with an economic motivation – is nonetheless sufficient (see Pet. App. 15a), cannot be reconciled with *Bolger*'s conclusion that "economic motivation * * * would *clearly be insufficient* by itself to turn the materials into commercial speech." 463 U.S. at 66 (emphasis added). That has to be correct, for "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), in particular, settled that speech by businesses on matters of public concern is not "commercial speech," notwithstanding the business's pecuniary interest in the issue. See also, *e.g.*, *United States* v. *Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (ban on receiving honoraria for speeches and writing on matters of public concern violates First Amendment as applied to rank-and-file executive branch employees).

• Finally, *Central Hudson Gas & Electric Co.* v. *Public Service Commission*, 447 U.S. 557, 561 (1980), held that commercial speech is "expression related solely to the economic interests of the speaker and its audience." Petitioners, however, were concerned not only with the individual purchasing decisions of their audience but also with the prospect of legislation restricting multinational investment and production. But the California Supreme Court held it was immaterial that Nike sought to "influence" not just potential customers but also "lenders, investors, or *lawmakers*." Pet. App. 28a (emphasis added).

For their part, petitioners' listeners incorporated the statements not into their economic conclusions about the value of Nike's products but rather into their moral conclusions about Nike as a company. See *supra* at 9-10. As the court of appeal recognized, those conclusions could just as easily be "translate[d] * * * into political action" as into purchasing decisions. Pet. App. 78a. The California Supreme Court nonetheless found it sufficient that petitioners' statements, "although addressed to

the public *generally*, were *also* intended to reach and influence actual and potential purchasers of Nike's products." *Id.* 21a (emphases added).

3. Nor could the California Supreme Court justify its remarkable departure from this Court's precedents on the ground that its decision at least adhered to the *rationale* underlying the "commercial speech" doctrine. "Commercial speech" under this Court's precedents is "'linked inextricably' with the commercial arrangement that it proposes" (*Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993)), such that governmental regulation is an adjunct to the state's interest in "regulating the underlying transaction" (*id.*) and thus in "preventing commercial harms" (*Cincinnati* v. *Discovery Network*, 507 U.S. 410, 426 (1993)). Cf. *United Foods*, 533 U.S. at 412 (program of compelled speech may be constitutional as "the logical concomitant of a valid scheme of economic regulation"). In this case, by contrast, no one contends that petitioners' statements misled consumers regarding the characteristics of Nike products. Indeed, California law as authoritatively construed in this case does not require any nexus at all between the corporate operations described in the supposedly false or misleading speech and the transactions that occur in that state. This case principally involves statements regarding Nike's production in such countries as Vietnam, but it makes no difference for purposes of Kasky's complaint whether the Nike products made in Vietnamese factories are ever sold in the United States, much less in California. All that matters is that petitioners' statements supposedly make Nike look like a more ethical company to California consumers than it "truly is" – obviously, not a "*commercial*" harm.[2]

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[2] The requirement of a "commercial harm" is an application of the broader principle that speech may not be punished for "falsehood in the air" – *i.e.*, in the absence of an actual injury. Not only does the First Amendment preclude claims for defamation and for depiction in a "false light" on matters of public importance absent actual damage (*Time, Inc.* v. *Hill*, 385 U.S. 374, 387 (1967)), but even on matters of purely *private* concern, such a suit is permitted only if the speech is "wholly false *and clearly damaging*" (*Dun & Bradstreet* v. *Greenmoss*

California is also regulating speech on matters of public importance. By contrast, the "commercial speech" identified as such under this Court's precedents has a lesser role in the system of free expression because, in contrast to "ideological expression," it supposedly makes little or no "direct contribution to the interchange of ideas." *Va. State Bd.* v. *Va. Citizens Consumer Coun.*, 425 U.S. 748, 780 (1976). The decision below nonetheless turns entirely on the view that the public will listen to and value corporate speech, reaching moral judgments as a result, particularly in such contexts as the public debate over social issues like globalization. That is hardly the stuff of "low-value speech." Rather, it typifies the discussion of "public issues" that "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983).[3]

For these reasons, the California Supreme Court was in error when it suggested (Pet. App. 23a) that its decision is tantamount to forbidding the mislabeling of a product as manufactured by the "blind" or by "American Indian" workers, or forbidding false designations of origin. When the government requires that truthful information be included on product labels, which consumers generally consider at the point of sale, it is regulating the terms of the underlying commercial transaction, and it is preventing the peculiarly "commercial harm" of a consumer being

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Bldrs., 472 U.S. 749, 762 (1984) (plurality) (emphasis added)). See, *e.g.*, *Masson* v. *New Yorker*, 501 U.S. 496, 516-17 (1991) (First Amendment permits libel actions recognized at common law "to redress injury").

[3] This Court's commercial speech precedents also take the view that governmental regulation of statements regarding price and the other inherent qualities of a product is unlikely to deter valuable speech. The speaker's profit motivation and its ready ability to verify the truth of its statements on such matters act as an "anti-freeze" to the chilling effect of regulation. The prospect that valuable speech will be chilled under the decision below, by contrast, is all too real, because the lower court's holding extends beyond economic information that is essential to sales and that is easily verified to include the discussion of broad social issues. See generally *infra* at 26-27.

induced to purchase a product on the basis of a false description of its character. Further, as to both the speaker and the listener, the communication that is arguably actionable includes only a statement of fact divorced from any broader context or controversy and relates only to whether to consummate an already contemplated transaction, for the prospective purchaser's reading of the label provides neither the occasion for, nor any realistic prospect of, moral, ethical, or political debate. See generally *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). That is quite different from government efforts to regulate the content of communications offered – by just one side – in the course of a live and pressing public debate on a matter of international significance.[4]

B. The Decision Below Conflicts With *Thornhill* v. *Alabama* and *Thomas* v. *Collins*.

The California Supreme Court's decision conflicts not only with this Court's decisions defining commercial speech (see *supra*), but also with two seminal precedents holding that speech indistinguishable from petitioners' receives the full protections of the First Amendment. Not even the majority below seriously contended that its decision could be reconciled with *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), and *Thomas* v. *Collins*, 323 U.S. 516 (1945). That conflict alone warrants certiorari. Even engaging in the insupportable assumption (see *infra* at 17-18) that *Thomas* and *Thornhill* have become moribund as the majority below thought (see Pet. App. 24a-25a), certiorari should be granted because it is "this Court's prerogative alone to overrule

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[4] In any event, this Court has never passed on the degree of First Amendment scrutiny applicable to the labeling provisions cited by the majority below, violations of which would readily be shown to satisfy the "actual malice" standard applicable to protected speech except in the rarest instance that a manufacturer made the truly "innocent mistake" of mislabeling its products' geographic origin or the special class of persons it employs. Cf. *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function." (emphasis added)).

one of its precedents" (*State Oil Co.* v. *Kahn*, 522 U.S. 3, 20 (1997); see also *Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 477, 484 (1989)).

Thornhill holds that a ban on labor picketing violates the First Amendment. There, as here, the purpose of the speech "was concededly to advise customers and prospective customers" regarding labor conditions "and thereby to induce such customers" to change their purchasing decisions. 310 U.S. at 99. In contrast to the California Supreme Court's reasoning that petitioners' speech receives reduced constitutional protection because it sometimes influences purchasing decisions, this Court in *Thornhill* recognized that speech on matters such as "satisfactory hours and wages and working conditions in industry" is not limited to "mere local or private concern" but is instead "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.* at 103. Furthermore, "*[e]very* expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.* at 104 (emphasis added).

Thornhill also rejects the California Supreme Court's view that the state may regulate petitioners' speech as an adjunct to its regulation of consumer transactions. This Court explained that, although the government has the unquestioned authority "to set the limits of permissible contest open to industrial combatants," "[i]t does not follow that the State * * * may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." *Id.* Presaging this very case, the Court explained that "[a] contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society." *Id.* That is particularly true where, as here, government seeks to regulate "nearly every practicable, effective means whereby those interested * * * may enlighten the public." *Id.*

The decision below equally conflicts with the follow-on holding of *Thomas* v. *Collins* that the First Amendment forbids a flat ban on the solicitation of union membership – or a law subjecting such solicitation to a licensing scheme – and that the First Amendment provides employers and employees "the same protection." Whereas the California Supreme Court opined that it would be possible for Nike – in interviews, letters, press releases, and the like – to discuss globalization and the accusations against the company without mentioning *facts*, this Court made clear in *Thomas* that no speaker can be expected to split its remarks apart in that fashion. Rejecting the state's argument that the statute merely required a license for *solicitation*, the Court explained: "How one might 'laud unionism' * * * yet in these circumstances not imply an invitation, is hard to conceive. * * * Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." 323 U.S. at 534-35. "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussions of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty," this Court explained, "freedom of speech will be at an end." *Id.* at 536-37.

Rather than come to terms with *Thornhill* and *Thomas*, the court below brazenly declined to follow them. First, it contended that the cases are inapposite because "neither decision addressed the validity of a law prohibiting false or misleading speech." Pet. App. 24a. But that makes no sense, for, as Justice Brown recognized in her dissent (*id.* 60a), the question whether a statement is true has nothing to do with whether it is entitled to lesser constitutional protection because it is "commercial." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964), for example, held that an editorial advertisement purchased by civil rights leaders to solicit financial support was fully protected by the First Amendment notwithstanding the fact that some of the statements it contained were unquestionably false. *Thornhill* and *Thomas* similarly hold that speech regarding labor conditions is entitled to the full protection of the First Amendment,

and that conclusion would have been unaffected if some of the labor exhortations in those cases had been false or misleading.

Second, the majority below contended that it could ignore *Thornhill* and *Thomas* because those decisions had been superceded by "the modern commercial speech doctrine" (Pet. App. 24a). That argument ignores the last half-century of First Amendment law. *Thornhill* and *Thomas* described a category of speech that was held subject to the full protection of the First Amendment decades before "purely commercial" speech received any constitutional protection at all (see *Valentine* v. *Christensen*, 316 U.S. 52 (1942)); later precedents only *expanded* the protection for commercial speech. Not surprisingly, then, far from suggesting the eclipse or demise of *Thornhill* and *Thomas*, this Court has cited those decisions with approval more than *one hundred and twenty five* times, including in many leading free speech precedents,[5] some quite recent.[6] *Thornhill* and *Thomas* undergird the recognition of the First Amendment right to speak on matters of importance[7] and, in particular, the right to engage in social protest that uses economic pressure to generate social change recognized in the line of cases spanning from *NAACP* v. *Button*, 371 U.S. 415, 430 (1963), to *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 908-11 (1982).

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[5] *E.g.*, *Cincinnati* v. *Discovery Network*, 507 U.S. 410, 421 (1993); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 67, 68 n.15 (1983); *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Coun.*, 425 U.S. 748, 757 (1976); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

[6] *E.g.*, *Watchtower Bible & Tract Soc'y* v. *Village of Stratton*, 122 S. Ct. 2080, 2082, 2088 (2002); *Bartnicki* v. *Vopper*, 532 U.S. 514, 534 (2001).

[7] *E.g.*, *Meyer* v. *Grant*, 468 U.S. 414, 421 (1988); *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n*, 475 U.S. 1, 8-9 (1986); *FCC* v. *League of Women Voters*, 468 U.S. 364, 381-82 (1984); *Con. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 534-35 (1980); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665, 705 n.40 (1972); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

Certiorari should be granted to resolve the conflict between the California Supreme Court's decision and both this Court's commercial speech jurisprudence and its seminal decisions in *Thornhill* and *Thomas*.

II. Even If Factual Statements On Public Issues Can Be Characterized As "Commercial Speech," The Statutory Scheme Applied By California In This Case Conflicts With This Court's First Amendment Precedents.

The California Supreme Court concluded that, if corporations' statements on public issues can be characterized as "commercial speech," those statements can *eo ipso* be the subject of a suit for unfair trade practices and false advertising. That reasoning fails for two separate reasons.[8]

A. Because California Law Permits Suits Only Against Corporations Rather Than Their Accusers, The Decision Below Conflicts With This Court's Precedents Prohibiting Viewpoint Discrimination.

The California Supreme Court's definition of "commercial speech" is not only vastly overexpansive, but it is entirely one-sided as well. Despite the fact that consumers are equally likely to reach conclusions about whether a company's conduct is ethi-

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[8] As Justice Brown recognized in her dissent below, the assumption that all economically or commercially motivated speech can be treated "the *same* under the First Amendment" is unsustainable. Pet. App. 41a. Her view is consistent with this Court's admonition that "the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). "Regardless of the particular label asserted by the State – whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Id.* Assertions that speech may be regulated or prohibited as "commercial" thus "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

cal on the basis of *accusations* against the company as by its *response*, the majority below held that only the latter could give rise to a suit for unfair trade practices and false advertising. The decision below thus conflicts with the bedrock rule that the government may not favor speech from a particular viewpoint. "There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). Put another way, the California Supreme Court has impermissibly "license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 392 (1992).

The prohibition on viewpoint discrimination applies fully to the government's regulation of commercial speech. "[E]ven under the degree of scrutiny that [this Court has] applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." *Greater New Orleans B'casting Ass'n* v. *United States*, 527 U.S. 173, 193-94 (1993). In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), the Court applied this speech-equality principle to invalidate a state ordinance barring corporations, but not individuals, from making expenditures or contributions relating to referendum issues. "The inherent worth of the speech in terms of its capacity for informing the public," this Court explained, "does not depend upon the identity of its source, whether corporate, association, union, or individual." *Id.* at 777. "Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86. When the government "has limited the means by which [a corporation] may participate in the public debate on * * * controversial issues of national interest and importance," it "strikes at the heart of the freedom to speak." *Con. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 535 (1980).

The California Supreme Court admitted that its decision grants favored treatment to accusations against companies, but it

erroneously thought that result was the inevitable consequence of the commercial speech doctrine. The majority below reasoned that, while cases such as *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), hold (or at least assume) that negative reviews of products are fully protected speech, "[a] commercial speaker's statements in praise or support of the same product, by comparison, are commercial speech." Pet. App. 27a. But even assuming that the lesser protections accorded to "commercial speech" apply to a seller's response to a product review that was itself fully protected by the First Amendment (a question this Court has never reached), that differential treatment results from the fact that the government has a distinct interest in regulating the company's statements when they are tied "inextricably" to the sale of a product. By contrast, accusations and responses not so tied to sales but instead addressed to corporations' operations implicate identical governmental interests, even if only the latter is labeled "commercial speech." "[D]iscrimination between commercial and noncommercial speech" is forbidden as a form of viewpoint discrimination when, as in this case, "the distinction bears no relationship whatsoever to the particular interests that the [government] has asserted." *Discovery Network*, 507 U.S. at 424 & n.20.

For similar reasons, the California Supreme Court was wrong to assert (Pet. App. 27a) that the prohibition against viewpoint discrimination is inapplicable when the government regulates only speech that supposedly receives "no protection" under the First Amendment – here, "false or misleading" commercial speech. That is precisely the argument rejected in *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992). The characterization of certain statements as "not within the area of constitutionally protected speech" means only that those statements "can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) – not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 383-84. California thus cannot immunize from suit accusations regarding corporate operations while prohibiting

or holding actionable businesses' responses that implicate the same governmental interests.

B. Because Businesses Cannot Realistically Make Statements Of Opinion Without Mentioning Facts, The Decision Below Conflicts With This Court's Precedents According Full Protection To Commercial Speech That Is Inextricably Intertwined With Fully Protected Speech.

Certiorari is also warranted because the ruling below conflicts with this Court's holding that, when even purely commercial speech is "inextricably intertwined" with noncommercial speech on matters of public concern, "the entirety" of the speech must "be classified as noncommercial." *Fox*, 492 U.S. at 474; see also, *e.g.*, *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). The California Supreme Court held that a corporation's statements of *fact* about its operations are commercial speech while its accompanying statements of *opinion* are fully protected by the First Amendment. That dichotomy lacks merit (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)), but in any event, this Court's precedents reject the proposition that statements of fact and opinion can be segregated for constitutional purposes.

The majority below held that lessened First Amendment scrutiny applies because "[n]o law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately." Pet. App. 26a. But on any realistic assessment, Nike was under a "*practical* compulsion" (contra Pet. App. 26a (emphasis added) (citing *Fox*, 492 U.S. at 474)) to discuss its operations, which is all this Court's precedents require. It "would be both artificial and impractical" for a court to "parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* 37a-38a. If we permit the government to reduce public discussion "to innocuous and abstract discussions" about social issues, "freedom of speech will be at an end." *Thomas* v. *Collins*, 323 U.S. 516, 536-37 (1945).

In this case, for example, for petitioners to answer the claim that "Nike exemplifies the harms of globalization because it underpays workers" with the tepid response that "Nike believes globalization is in the abstract a good thing" would not address (and might even be taken to concede) the basic moral and political assertion inherent in the criticism – *viz.* that globalization is bad *because* it is accompanied by commercial exploitation of the sort allegedly exemplified by Nike. Furthermore, as Justice Brown observed in her dissent, Nike's factual statements about its overseas labor practices cannot be separated from the public issue because "Nike's overseas labor practices *are* the public issue." Pet. App. 56a-57a. "Thus, general statements about overseas labor and economic globalization do not provide Nike with a meaningful way to participate in the public debate over its overseas labor practices." *Id.* 57a.

That is not to say that an "advertiser" may "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S at 68. But the California Supreme Court's decision is not directed at such an artifice. There is no allegation that Nike attempted artificially to link otherwise commercial statements to a social issue. The fact that Nike's critics have linked Nike's products and practices to the public issue of globalization – so that it is now impossible, as a practical matter, for Nike to participate in that public debate without referring to its own products and practices – cannot strip Nike of the full protections normally afforded to core free speech.

III. The Decision Below Prohibits And Chills Protected Speech Far Beyond California's Borders in A Manner and to A Degree That Requires This Court's Immediate Review.

Not only is the decision below irreconcilable with this Court's First Amendment precedents, but it is essential that certiorari be granted now to resolve the conflict. For the reasons described above, the California Supreme Court's decision directly prohibits core free speech. But the profound chilling effect of the ruling is far more troubling still, because speakers

everywhere now labor under California's *post hoc*, strict liability regime, which applies to speech anywhere in the world by any enterprise that does business in that state. Not since *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), has this Court been confronted with a lower court ruling as profoundly destructive of free speech.

Nor is there any reason to defer review for the years that it will take to complete the proceedings on remand followed by a second round of review in the California appellate courts. No development on remand can alleviate the damage wrought by the decision below. Further, California's liability scheme is so outlandish that research has disclosed no other jurisdiction in the nation recognizing a cause of action that could give rise to litigation on similar issues and thereby generate a conflict in the lower courts for this Court to resolve. Thus, to leave standing the decision below would for the first time allow a single state to check-mate the conscious determination of every other sovereign in the United States to leave unregulated the sort of public speech at issue in this case. The resulting infringement on free speech with "each passing day constitute[s] an irreparable infringement of First Amendment values." *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 580 (1976) (Brennan, J., concurring in the judgment).

1. The decision below provides no protection even for the best-intentioned speaker: it imposes "strict liability" on a *post hoc* evaluation of the facts, accounting neither for the circumstances (such as the demand for an immediate comment regarding an imminent news report) nor for the fact that the defendant may have spoken only after first making its best efforts to verify the truth of its statement. See *supra* at 4. The California Supreme Court, moreover, failed to limit the available remedies to cease-and-desist orders forbidding further misstatements but approved a regime that contemplates requiring defendants to "disgorge" the supposedly ill-gotten gain of revenue somehow traceable to their statements and imposing a court-supervised campaign of corrective speech. See *supra* at 4-5.

In point of fact, the California Supreme Court has long construed the capacious remedial provisions of California's unfair

trade practices statute so as to "deter the defendant, and similar entities, from engaging in such practices in the future," stressing its commitment to "effectuate the full deterrent force" of the statute. *Fletcher* v. *Sec. Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979). The recognition by the majority below that "application of these laws may make Nike more cautious" (Pet. App. 25a) is just a backhanded acknowledgement that the statutory scheme is designed precisely to make corporations reticent to speak unless absolutely certain that all of their remarks will in hindsight be found truthful.

The chilling effect of such a scheme is patent. A corporation can assure its safety from a potentially devastating monetary award only by refusing to say anything at all. Although false statements as such are not affirmatively protected by the First Amendment, this Court has often noted that "a rule that would impose strict liability" on a speaker "for false factual assertions" regarding a matter of public concern "would have an undoubted 'chilling' effect" on speech "that *does* have constitutional value." *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) (emphasis added). Recognizing that "erroneous statement is inevitable in free debate," this Court has held that error, too, "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272-73 (1964) (alteration and citation omitted).

The chilling effect of the California Supreme Court's decision is considerably heightened by the wide swath of speech it encompasses – both in subject-matter and in form. In contrast to government regulation of speech describing product qualities that are readily ascertainable by a corporation (*e.g.*, that a product is "Made in the U.S.A."), *Kasky* liability attaches to a corporation's discussion of almost any topic related to its own business practices that might matter to citizens as consumers – including but not limited to labor conditions, the environment, responsible investment, or community involvement. And, in contrast to government regulation of product labels and commercial advertising, California's scheme encompasses speech in any format and in any forum, including newspaper editorials, so long

as that speech is received in California. This case, for example, involves letters to the editor, op-eds, and editorial advertisements published around the country rather than principally in California. By the same token, virtually every statement by a corporation of any size that is placed on the Internet or carried in a substantial publication will give rise to an unavoidable risk of *Kasky* liability. Californians both consume almost everything (standing alone, that one state has the *world's* fifth-largest economy) and also receive all manner of media (its population of nearly 34 million is larger than that of many countries).

Indeed, the majority below went so far as to hold that the First Amendment does not protect even statements made to "persons (such as *reporters* or *reviewers*) [who are] likely to repeat the message to or otherwise influence actual buyers or customers." Pet. App. 18a (emphases added). Unable to know *ex ante* whether a press account will carry remarks accurately or completely, a corporation would be foolish to continue to provide information freely to the media. Kasky's suit against Oregon-based Nike over statements to *The New York Times* regarding commercial production in Southeast Asia is obviously just the beginning, for the decision below applies equally to statements by European and Asian manufacturers carried in the *Economist*, *Asian Wall Street Journal*, and *International Herald Tribune*. To leave standing a ruling permitting a state to "exert the power sought here over a wide variety of national publications or interstate newspapers carrying [speech] * * * * would impair, perhaps severely, the[] proper functioning" of the press and the free exchange of ideas generally. *Bigelow* v. *Virginia*, 421 U.S. 809, 828-29 (1975).

By so overreaching, the court below furthermore ensured that the chilling effect of its ruling would not be ameliorated by the "anti-freeze" that this Court in the past has associated with traditional "commercial speech":

- "Since *advertising* is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely." *Va. Pharm. Bd.* v. *Va. Consumer Coun.*, 425 U.S. 748, 772 n.24 (1976) (emphasis added). By contrast, a corporation faced with the prospect of *Kasky* li-

ability in an uncertain but potentially staggering amount can and will forgo or at the least limit speech on those broader social and moral issues that have a less direct impact on its bottom line.

- A corporation can with relatively little difficulty verify information regarding the "*product* and *its price*." *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring) (quoting *Va. Bd.*, 425 U.S. at 777-78 (Stewart, J., concurring)) (emphases added). That information is entirely within the speaker's control and is publicly disseminated not on short notice but in advertisements generally planned well in advance. *Kasky* liability, by contrast, sweeps broadly enough to reach Nike's on-the-spot responses to accusations about any of the half-million individuals employed not by it, but by its subcontractors on the other side of the planet. Such responses (unlike the product and price promotions that a profit-motivated speaker can be counted on to address) would predictably be chilled first by delay while the speaker seeks to verify all the facts and then by silence inasmuch as no degree of effort suffices to protect the speaker from the strict liability of California law.

Other features of the California liability scheme aggravate the chilling effect of the California Supreme Court's decision. In particular, the decision below is not limited to claims brought by persons alleged to have been misled by a corporation's statements but invests every single California resident with the power of a "private attorney general." Under the relevant provisions of California law, "[a]llegations of actual deception, reasonable reliance, and damage are unnecessary." *Comm'n on Children's Television* v. *General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983). Everyone in California has the right to sue any corporation that happens to sell any product or service in that state over the accuracy of any statement bearing on that corporation's activities or on those of the businesses or nations with which it deals. Kasky, for example, alleges no injury and concedes he knows nothing about the facts but can still serve as plaintiff without bearing any costs under a contingent-fee arrangement with his lawyers. Provisions like these vastly increase the litigation exposure of any corporation that speaks (however indirectly) to California audiences. The "burden and

expense of litigating," without more, will "unduly impinge on the exercise of the constitutional right" by corporate speakers, making the dissemination of truthful information "the loser." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 n.21 (1978) (citation and alteration omitted).

This extraordinary chilling effect is fact, not hypothesis or prediction. In light of the California Supreme Court's decision, Nike has substantially restricted its communications on social issues, including to national and international media that could reach California consumers. Among other things, Nike has determined that the risk of suits in California asserting the *Kasky* theory is too great to release publicly anywhere in the world its next annual Corporate Responsibility Report, the company's single most important document describing its initiatives and progress on matters such as labor compliance, community affairs, sustainable development, and workplace programs.

2. The profoundly harmful consequences of the decision below would not be offset in any respect by permitting this case to proceed in the lower courts for a determination "whether any false representations were made" (Pet. App. 2a) by petitioners. During any further proceedings, the California Supreme Court's decision of course remains a definitive statement of the law unless and until this Court says the contrary. No business – not even Nike – can take solace in the prospect that the particular statements involved in this one lawsuit might ultimately be held truthful, or at least insufficiently misleading or incomplete to be actionable under the California scheme, because that result would do nothing at all to diminish the ongoing threat of essentially identical inquisitions into the truth of the next set of statements (and the next, and the next, and so on *ad infinitum*) at the behest of any California citizen inclined to initiate such an inquisition as long as Nike or any other target chooses to defend itself in the media. And it is this ongoing threat, this Sword of Damocles, that works a forbidden chill of protected speech as long as this Court permits it to hang.

The California Supreme Court's judgment is thus "final" with respect to the federal constitutional questions presented by this petition, see 28 U.S.C. 1257(a), which are agreed by all to

be outcome determinative to the litigation and are properly brought before this Court now. See *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1988); *Cox B'casting Corp.* v. *Cohn*, 420 U.S. 469, 485-86 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). Indeed, given that petitioners' defense is that Kasky's lawsuit is flatly prohibited by the First Amendment and therefore must be dismissed at the outset, the questions presented are most appropriately resolved in precisely this posture.

Nor is there any real prospect that the questions presented could be ventilated in other jurisdictions, much less that a conflict would later emerge for this Court to resolve. The California Supreme Court's rejection of petitioners' First Amendment defense authoritatively extends that state's consumer protection statutes well beyond anything hitherto seen in American law. A comprehensive review of decisions under the federal Lanham Act and Federal Trade Commission Act, as well as the unfair trade practice and false advertising laws of the forty-nine other states, reveals that those provisions have *never* been extended *remotely* as far as was endorsed in this case. Only California confers the right to sue as private attorney general upon each of its citizens without regard to injury and holds the defendant corporation strictly liable for statements that neither appear in an advertising format nor refer to any product, even if they address a social issue that is the subject of an ongoing public debate.

Because neither the federal government nor any other state would be likely enough to recognize the cause of action asserted here to make the expense of suing anywhere but in California worth the candle, the question presented is exceedingly unlikely to arise in another state or federal court of appeals. Nor could the question even arise in the federal district courts of California and eventually the Ninth Circuit, for plaintiffs like Kasky employ the gambit of disavowing any injury from the outset precisely to preclude removal of their California tort suits to federal court. See, *e.g.*, *Mortera* v. *N. Am. Mortgage*, 172 F. Supp. 2d 1240 (N.D. Cal. 2001); *Toxic Injuries Corp.* v. *Safety-Kleen Corp.*, 57 F. Supp. 2d 947 (C.D. Cal. 1999); *Mangini* v. *R.J. Reynolds Tob.*, 793 F. Supp. 925 (N.D. Cal 1992).

Fortunately, the necessity of immediate review and the absence of any realistic prospect that the constitutional issues involved will be posed more suitably later in this litigation or in any other lawsuit are matched by the unique suitability of this case for resolving the questions presented. Petitioners and respondent are agreed that the constitutional questions presented are outcome determinative. See *supra* at 5. This case arises, moreover, not from a notice pleading, but instead from the detailed recitation in respondent Kasky's complaint of the full array of allegations of unethical behavior lodged against Nike, and of the assertedly false statements that petitioners made in response. Respondent has appended dozens of exhibits spanning more than 250 pages so that the statements can be reviewed in their context. See generally Pet. Lodging.

* * * *

The upshot of the foregoing is that the California Supreme Court's decision in this case, without regard to what might occur at trial or to what any other court might later hold, will continue, unless reviewed and reversed by this Court, to substantially restrict the communication of important information regarding a uniquely valuable perspective on hotly debated social issues, and it will do so far beyond California's borders. In the great majority of the cases on this Court's certiorari docket, the ruling of which review is sought has few tangible effects beyond the parties to the suit and might even be ameliorated by petitioner's vindication in later proceedings. The result is that, in those cases, certiorari can be denied and the question presented be safely allowed to percolate. Here, by contrast, the continuing prospect of liability under the *Kasky* holding casts a genuinely global pall over speech and will *continue* to cast that pall whatever happens on remand in this case and whatever any other court inferior to this one might hold. Certiorari accordingly should be granted now.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 14, 2002

APPENDIX

MARC KASKY,
Plaintiff and Appellant,

v.

NIKE, INC., et al.
Defendants and Respondents.

No. S087859

CALIFORNIA SUPREME COURT

May 2, 2002, Decided

OPINION

Acting on behalf of the public, plaintiff brought this action seeking monetary and injunctive relief under California laws designed to curb false advertising and unfair competition. Plaintiff alleged that defendant corporation, in response to public criticism, and to induce consumers to continue to buy its products, made false statements of fact about its labor practices and about working conditions in factories that make its products. Applying established principles of appellate review, we must assume in this opinion that these allegations are true.

The issue here is whether defendant corporation's false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions. Resolution of this issue is important because commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and because governments may entirely prohibit commercial speech that is false or misleading.

Because the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, we conclude that these messages are commercial speech for purposes of applying state laws barring false and misleading com-

mercial messages. Because the Court of Appeal concluded otherwise, we will reverse its judgment.

Our holding, based on decisions of the United States Supreme Court, in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully. Unlike our dissenting colleagues, we do not consider this a remarkable or intolerable burden to impose on the business community. We emphasize that this lawsuit is still at a preliminary stage, and that whether any false representations were made is a disputed issue that has yet to be resolved.

I. FACTS

This case comes before us after the superior court sustained defendants' demurrers to plaintiff's first amended complaint. We therefore begin by summarizing that complaint's allegations, accepting the truth of the allegations, as we must, for the limited purposes of reviewing the superior court's ruling. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885; accord, *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 807; *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 957.)

A. Allegations of the First Amended Complaint

Plaintiff Marc Kasky is a California resident suing on behalf of the general public of the State of California under Business and Professions Code sections 17204 and 17535.[1] Defendant Nike, Inc. (Nike) is an Oregon corporation with its principal place of business in that state; Nike is authorized to do business in California and does promote, distribute, and sell its products in this state. The individual defendants (Philip Knight, Thomas Clarke, Mark Parker, Stephen Gomez, and David Taylor) are officers and/or directors of Nike.

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[1] Except as otherwise noted, unlabeled section references are to the Business and Professions Code.

Nike manufactures and sells athletic shoes and apparel. In 1997, it reported annual revenues of $9.2 billion, with annual expenditures for advertising and marketing of almost $1 billion. Most of Nike's products are manufactured by subcontractors in China, Vietnam, and Indonesia. Most of the workers who make Nike products are women under the age of 24. Since March 1993, under a memorandum of understanding with its subcontractors, Nike has assumed responsibility for its subcontractors' compliance with applicable local laws and regulations concerning minimum wage, overtime, occupational health and safety, and environmental protection.

Beginning at least in October 1996 with a report on the television news program *48 Hours*, and continuing at least through November and December of 1997 with the publication of articles in the Financial Times, the New York Times, the San Francisco Chronicle, the Buffalo News, the Oregonian, the Kansas City Star, and the Sporting News, various persons and organizations alleged that in the factories where Nike products are made workers were paid less than the applicable local minimum wage; required to work overtime; allowed and encouraged to work more overtime hours than applicable local law allowed; subjected to physical, verbal, and sexual abuse; and exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local occupational health and safety regulations.

In response to this adverse publicity, and for the purpose of maintaining and increasing its sales and profits, Nike and the individual defendants made statements to the California consuming public that plaintiff alleges were false and misleading. Specifically, Nike and the individual defendants said that workers who make Nike products are protected from physical and sexual abuse, that they are paid in accordance with applicable local laws and regulations governing wages and hours, that they are paid on average double the applicable local minimum wage, that they receive a "living wage," that they receive free meals and health care, and that their working conditions are in compliance with applicable local laws and regulations governing occupational health and safety. Nike and the individual defendants

made these statements in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes. Nike also bought full-page advertisements in leading newspapers to publicize a report that GoodWorks International, LLC., had prepared under a contract with Nike. The report was based on an investigation by former United States Ambassador Andrew Young, and it found no evidence of illegal or unsafe working conditions at Nike factories in China, Vietnam, and Indonesia.

Plaintiff alleges that Nike and the individual defendants made these false and misleading statements because of their negligence and carelessness and "with knowledge or reckless disregard of the laws of California prohibiting false and misleading statements."

B. Superior Court Proceedings

Based on these factual allegations, plaintiff's first amended complaint sought relief in the form of restitution requiring Nike to "disgorge all monies . . . acquired by means of any act found . . . to be an unlawful and/or unfair business practice," and relief in the form of an injunction requiring Nike to "undertake a Court-approved public information campaign" to correct any false or misleading statement, and to cease misrepresenting the working conditions under which Nike products are made. Plaintiff also sought reasonable attorney fees and costs and other relief that the court deemed just and proper.

Nike demurred to the first amended complaint on grounds, among others, that it failed to state facts sufficient to constitute a cause of action against Nike and that the relief plaintiff was seeking "is absolutely barred by the First Amendment to the United States Constitution and Article I, section 2(a) of the California Constitution." The individual defendants separately demurred to the first amended complaint on the same grounds.

On January 7, 1999, the superior court held a hearing on defendants' demurrers. At the hearing, the court stated that it considered the crucial question to be whether Nike's allegedly false and misleading statements noted in the first amended complaint constituted commercial or noncommercial speech, because the

answer to this question would determine the amount of protection the statements would receive under the federal and state constitutional free speech guarantees. After considering the arguments and authorities submitted by the parties, the court took the matter under submission and later sustained the demurrers without leave to amend. Plaintiff appealed from the judgment dismissing the complaint.

C. Court of Appeal Proceedings

The Court of Appeal affirmed the judgment. Like the superior court, the appellate court identified as the crucial issue whether Nike's allegedly false and misleading statements were commercial or noncommercial speech for purposes of analyzing the protections afforded by the First Amendment to the federal Constitution and by article I, section 2 of the California Constitution. Also like the superior court, the appellate court concluded that Nike's statements were noncommercial speech and therefore subject to the greatest measure of protection under the constitutional free speech provisions. The court stated that this determination "compels the conclusion that the trial court properly sustained the defendants' demurrer without leave to amend." We granted plaintiff's petition for review.

II. CALIFORNIA LAWS PROHIBITING CONSUMER DECEPTION

A. THE UNFAIR COMPETITION LAW

California's unfair competition law (UCL) (§ 17200 et seq.) defines "unfair competition" to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.)]." (§ 17200.) The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 110.)

The UCL's scope is broad. By defining unfair competition to include any "*unlawful* . . . business act or practice" (§ 17200, italics added), the UCL permits violations of other laws to be treated as unfair competition that is independently actionable. (*Cel-Tech*

Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180.) Here, for instance, plaintiff's first amended complaint alleged that Nike and the individual defendants violated the UCL by committing actual fraud as defined in and prohibited by Civil Code section 1572 and deceit as defined in and prohibited by Civil Code sections 1709 and 1710. By defining unfair competition to include also any "*unfair or fraudulent* business act or practice" (§ 17200, italics added), the UCL sweeps within its scope acts and practices not specifically proscribed by any other law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* at p. 180.) Plaintiff's first amended complaint also alleged a UCL violation of this type.

Not only public prosecutors, but also "any person acting for the interests of . . . the general public," may bring an action for relief under the UCL. (§ 17204.) Under this provision, a private plaintiff may bring a UCL action even when "the conduct alleged to constitute unfair competition violates a statute for the direct enforcement of which there is no private right of action." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 565.) "This court has repeatedly recognized the importance of these private enforcement efforts." (*Kraus v. Trinity Management Services* (2000) 23 Cal.4th 116, 126.)

In a suit under the UCL, a public prosecutor may collect civil penalties, but a private plaintiff's remedies are "generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra,* 20 Cal.4th at p. 179; see §§ 17203, 17206; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1268.) An order for restitution may require the defendant "to surrender all money obtained through an unfair business practice" including "all profits earned as a result of an unfair business practice." (*Kraus v. Trinity Management Services, Inc., supra,* 23 Cal.4th at p. 127.)

B. The False Advertising Law

California's false advertising law (§ 17500 et seq.) makes it "unlawful for any person, . . . corporation . . ., or any employee

thereof with intent directly or indirectly to dispose of real or personal property or to perform services . . . or to induce the public to enter into any obligation relating thereto, to make or disseminate . . . before the public in this state, . . . in any newspaper or other publication . . . or in any other manner or means whatever . . . any statement, concerning that real or personal property or those services . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ." (§ 17500.) Violation of this provision is a misdemeanor. (*Ibid.*) As with the UCL, an action for violation of the false advertising law may be brought either by a public prosecutor or by "any person acting for the interests of itself, its members or the general public," and the remedies available to a successful private plaintiff include restitution and injunctive relief. (§ 17535.)

C. Common Features of the UCL and the False Advertising Law

This court has recognized that "[a]ny violation of the false advertising law . . . necessarily violates" the UCL. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 210.) We have also recognized that these laws prohibit "not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." (*Leoni v. State Bar* (1985) 39 Cal.3d 609, 626.) Thus, to state a claim under either the UCL or the false advertising law, based on false advertising or promotional practices, "it is necessary only to show that 'members of the public are likely to be deceived.' " (*Committee on Children's Television, Inc. v. General Foods Corp., supra,* 35 Cal.3d at p. 211; accord, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

III. CONSTITUTIONAL PROTECTIONS FOR SPEECH

A. Federal Constitution

1. Constitutional text and its application to state laws

The United States Constitution's First Amendment, part of the Bill of Rights, provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." (U.S. Const., 1st

Amend.) Although by its terms this provision limits only Congress, the United States Supreme Court has held that the Fourteenth Amendment's due process clause makes the freedom of speech provision operate to limit the authority of state and local governments as well. (*McIntyre v. Ohio Elections Comm'n* (1995) 514 U.S. 334, 336, fn. 1.)

2. Constitutional protection of commercial speech

Although advertising has played an important role in our nation's culture since its early days, and although state regulation of commercial advertising and commercial transactions also has a long history, it was not until the 1970's that the United States Supreme Court extended First Amendment protection to commercial messages. In 1975, the court declared that it was error to assume "that advertising, as such, was entitled to no First Amendment protection." (*Bigelow v. Virginia* (1975) 421 U.S. 809, 825.) The next year, the court held that a state's complete ban on advertising prescription drug prices violated the First Amendment. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 770.) The high court observed that "the free flow of commercial information is indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered." (*Id.* at p. 765.)

3. Tests for commercial and noncommercial speech regulations

"[T]he [federal] Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 64-65 (*Bolger*).)

For noncommercial speech entitled to full First Amendment protection, a content-based regulation is valid under the First Amendment only if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest. (*United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 813; *Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 540.)

"By contrast, regulation of commercial speech based on content is less problematic." (*Bolger, supra,* 463 U.S. at p. 65.) To determine the validity of a content-based regulation of commercial speech, the United States Supreme Court has articulated an intermediate-scrutiny test. The court first articulated this test in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557 (*Central Hudson*) and has since referred to it as the *Central Hudson* test. The court explained the components of the test this way: "At the outset, we must determine whether the expression is protected by the First Amendment. *For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.* Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (*Id.* at p. 566, italics added; accord, *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, __ [121 S.Ct. 2404, 2421]; *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 183.) The court has clarified that the last part of the test—determining whether the regulation is not more extensive than "necessary"—does not require the government to adopt the least restrictive means, but instead requires only a "reasonable fit" between the government's purpose and the means chosen to achieve it. (*Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 480.)

4. Regulation of false or misleading speech

"[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate on public issues.' " (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 340.) For this reason, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 771.)

Nevertheless, in some instances the First Amendment imposes restraints on lawsuits seeking damages for injurious falsehoods. It does so "to eliminate the risk of undue self-censorship

and the suppression of truthful material" (*Herbert v. Lando* (1979) 441 U.S. 153, 172) and thereby to give freedom of expression the " 'breathing space' " it needs to survive (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272; *Bose Corp. v. Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 513). Thus, "some false and misleading statements are entitled to First Amendment protection in the political realm." (*Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 495 (conc. opn. of Stevens, J.).)

But the United States Supreme Court has explained that the First Amendment's protection for false statements is not universal. (See *Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 762 (plur. opn. of Powell, J.) [stating that when speech "concerns no public issue" and is "wholly false and clearly damaging," it "warrants no special protection" under the First Amendment].) In particular, commercial speech that is false or misleading is not entitled to First Amendment protection and "may be prohibited entirely." (*In re R.M.J.* (1982) 455 U.S. 191, 203; see also *Edenfield v. Fane* (1993) 507 U.S. 761, 768 [observing that "the State may ban commercial expression that is fraudulent or deceptive without further justification"]; *Bolger, supra,* 463 U.S. at p. 69 [observing that "[t]he State may deal effectively with false, deceptive, or misleading sales techniques"]; *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 638 [observing that "[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading"]; *Central Hudson, supra,* 447 U.S. at p. 566 [stating that for commercial speech to come within First Amendment protection "it . . . must . . . not be misleading"]; *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383 [stating that "the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena"].)

With regard to misleading commercial speech, the United States Supreme Court has drawn a distinction between, on the one hand, speech that is actually or inherently misleading, and, on the other hand, speech that is only potentially misleading. Actually or inherently misleading commercial speech is treated

the same as false commercial speech, which the state may prohibit entirely. (*In re R.M.J., supra,* 455 U.S. at p. 203; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 150.) By comparison, "[s]tates may not completely ban potentially misleading speech if narrower limitations can ensure that the information is presented in a nonmisleading manner." (*Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* at p. 152; see also *Peel v. Attorney Reg. & Disciplinary Comm'n* (1990) 496 U.S. 91, 100; *In re R.M.J., supra,* at p. 203.)

As one Supreme Court Justice has remarked, "the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 781 (conc. opn. of Stewart, J.); see also *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 496, 501 (plur. opn. of Stevens, J.).) Thus, the high court has acknowledged that state laws may require a commercial message to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.) In the court's words, "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Id.* at pp. 771-772.)

5. Reasons for the distinction

The United States Supreme Court has given three reasons for the distinction between commercial and noncommercial speech in general and, more particularly, for withholding First Amendment protection from commercial speech that is false or actually or inherently misleading.

First, "[t]he truth of commercial speech . . . may be *more easily verifiable by its disseminator* than . . . news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that

he himself provides and presumably knows more about than anyone else." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24, italics added; see also *id.* at p. 777 (conc. opn. of Stewart, J.) [stating that "[t]he advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression"]; accord, *44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Dun & Bradstreet, Inc. v. Greenmoss Builders, supra,* 472 U.S. at p. 758, fn. 5 (plur. opn. of Powell, J.); *Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 504, fn. 22.)

Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24 [stating that "since advertising is the *Sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely"]; accord, *44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at p. 481; *Dun & Bradstreet, Inc. v. Greenmoss Builders, supra,* 472 U.S. at p. 758, fn. 5 (plur. opn. of Powell, J.).)

Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is " 'linked inextricably' to those transactions." (*44 Liquormart, Inc. v. Rhode Island, supra*, 517 U.S. at p. 499 (plur. opn. of Stevens, J.); *Edenfield v. Fane, supra,* 507 U.S. at p. 767; *Friedman v. Rogers* (1979) 440 U.S. 1, 10, fn. 9.) The high court has identified "preventing commercial harms" as "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech" (*Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 426), and it has explained that "[t]he interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech even when they are intermingled in

the same publications" (*id.* at p. 426, fn. 21). (See also *Rubin v. Coors Brewing Co., supra,* 514 U.S. at p. 496 (conc. opn. of Stevens, J.) [stating that "[t]he evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explains why we tolerate more governmental regulation of this speech than of most other speech"].)

6. Distinguishing commercial from noncommercial speech

The United States Supreme Court has stated that the category of commercial speech consists at its core of " 'speech proposing a commercial transaction.' " (*Central Hudson, supra,* 447 U.S. at p. 562; *Bolger, supra,* 463 U.S. at p. 66.) Although in one case the court said that this description was "the test for identifying commercial speech" (*Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at pp. 473-474), in other decisions the court has indicated that the category of commercial speech is not limited to this core segment. For example, the court has accepted as commercial speech a statement of alcohol content on the label of a beer bottle (*Rubin v. Coors Brewing Co., supra,* 514 U.S. at pp. 481-482), as well as statements on an attorney's letterhead and business cards identifying the attorney as a CPA (certified public accountant) and CFP (certified financial planner) (*Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. at p. 142).

Bolger, supra, 463 U.S. 60, presented the United States Supreme Court with the question whether a federal law prohibiting the mailing of unsolicited advertisements for contraceptives violated the federal Constitution's free speech provision as applied to certain mailings by a corporation that manufactured, sold, and distributed contraceptives. One category of mailings consisted of "informational pamphlets discussing the desirability and availability of prophylactics in general or [the corporation's] products in particular." (*Id.* at p. 62, fn. omitted.) The court noted that these pamphlets did not merely propose commercial

transactions. (*Id.* at p. 66.) Although the pamphlets were conceded to be advertisements, that fact alone did not make them commercial speech because paid advertisements are sometimes used to convey political or other messages unconnected to a product or service or commercial transaction. (*Ibid.*, citing *New York Times Co. v. Sullivan, supra,* 376 U.S. at pp. 265-266.) The court also found that references to specific products and the economic motivation of the speaker were each, considered in isolation, insufficient to make the pamphlets commercial speech. (*Bolger, supra,* at pp. 66-67.) The court concluded, however, that the *combination* of these three factors—advertising format, product references, and commercial motivation—provided "strong support" for characterizing the pamphlets as commercial speech. (*Id.* at p. 67.)

In two important footnotes, the high court provided additional insight into the distinction between commercial and noncommercial speech. In one footnote, the court gave this caution: "[We do not] mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech." (*Bolger, supra,* 463 U.S. at p. 67, fn. 14.)

In the other footnote, after observing that one of the pamphlets at issue discussed condoms in general without referring specifically to the corporation's own products, the court said: "That a product is referred to generically does not, however, remove it from the realm of commercial speech. For example, a company with sufficient control of the market for a product may be able to promote the product without reference to its own brand names. Or a trade association may make statements about a product without reference to specific brand names." (*Bolger, supra,* 463 U.S. at p. 66, fn. 13.)

Thus, although the court in *Bolger, supra,* 463 U.S. 60, identified three factors—advertising format, product references, and commercial motivation—that in combination supported a characterization of commercial speech in that case, the court not only rejected the notion that any of these factors is *sufficient* by itself,

but it also declined to hold that all of these factors in combination, or any one of them individually, is *necessary* to support a commercial speech characterization.

The high court also cautioned, as it had in past cases, that statements may properly be categorized as commercial "notwithstanding the fact that they contain discussions of important public issues," and that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech," explaining further that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger, supra,* 463 U.S. at pp. 67-68, fn. omitted; accord, *Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. 469, 475; *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at p. 637, fn. 7; see also *Greater New Orleans Broadcasting v. U.S., supra,* 527 U.S. at p. 184 [recognizing that commercial speech may concern a "subject of intense public debate"].)

Since its decision in *Bolger, supra,* 463 U.S. 60, the United States Supreme Court has acknowledged that "ambiguities may exist at the margins of the category of commercial speech." (*Edenfield v. Fane, supra,* 507 U.S. at p. 765; see also *Cincinnati v. Discovery Network, Inc., supra,* 507 U.S. at p. 419 [recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"]; *Zauderer v. Office of Disciplinary Counsel, supra,* 471 U.S. at p. 637 [stating that "the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps"].) Justice Stevens in particular has remarked that "the borders of the commercial speech category are not nearly as clear as the Court has assumed" (*Rubin v. Coors Brewing Co., supra,* 514 U.S. at p. 493 (conc. opn. of Stevens, J.)), and he has suggested that the distinction cannot rest solely on the form or content of the statement, or the motive of the speaker, but instead must rest on the relationship between the speech at issue and the justification for distinguishing commercial from noncommercial speech. In his words, "any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment

protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." (*Id.* at p. 494 (conc. opn. of Stevens, J.).)

B. The State Constitution

1. Constitutional text

The California Constitution's article I, entitled the Declaration of Rights, guarantees freedom of speech in subdivision (a) of section 2. It provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, subd. (a).)

2. Scope of the state constitutional provision

The state Constitution's free speech provision is "at least as broad" as (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490) and in some ways is broader than (*id.* at p. 491; *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1041) the comparable provision of the federal Constitution's First Amendment.

3. Commercial speech protection under the state Constitution

The state Constitution's free speech provision, which provides that "[e]very person may freely speak . . . *on all subjects*" (Cal. Const., art. I, § 2, subd. (a), italics added), protects commercial speech, at least when such speech is "in the form of truthful and nonmisleading messages about lawful products and services." (*Gerawan Farming, Inc. v. Lyons, supra,* 24 Cal.4th at p. 493.) This court has indicated, however, that our state Constitution does not prohibit the imposition of sanctions for misleading commercial advertisements. (*In re Morse* (1995) 11 Cal.4th 184, 200, fn. 4.) Allowing such sanctions is consistent with the text of the state constitutional provision, which makes anyone who "abuse[s]" the right of freedom of speech "responsible" for the misconduct. (Cal. Const., art. I, § 2, subd. (a); see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 746.) Our Courts of Appeal have held that neither the UCL nor the false advertising law on its face violates the state Constitution's free speech provision as an impermissible regulation of commercial speech. (*People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 195, cert. den. (1980) 446 U.S. 935; accord, *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1230, fn. 10.)

This court has never suggested that the state and federal Constitutions impose *different boundaries* between the categories of commercial and noncommercial speech. In our most recent decision on this point, *Leoni v. State Bar, supra,* 39 Cal.3d 609 (*Leoni*), this court addressed whether an attorney's solicitation of clients by means of allegedly misleading mass mailings and information was protected by the free speech provisions of the United States and California Constitutions. We used the same analysis for both constitutional provisions. (*Id.* at p. 614, fn. 2.) To determine whether the attorney's mailings were commercial or noncommercial speech, we relied on the three factors that the United States Supreme Court had used in *Bolger, supra,* 463 U.S. 60: advertising format, product references, and economic motivation. After concluding that two of these factors were present (because the mailings referred specifically to the attorney's services and the attorney had an economic motivation in sending them), we concluded that the presence of these two factors was sufficient to make the mailings commercial speech for purposes of the free speech protections of both the federal and the state Constitutions. (*Leoni, supra,* at pp. 623-624.)

IV. ANALYSIS

A. The United States Constitution

The United States Supreme Court has not adopted an all-purpose test to distinguish commercial from noncommercial speech under the First Amendment, nor has this court adopted such a test under the state Constitution, nor do we propose to do so here. A close reading of the high court's commercial speech decisions suggests, however, that it is possible to formulate a limited-purpose test. We conclude, therefore, that *when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three ele-

ments: the speaker, the intended audience, and the content of the message.

In typical commercial speech cases, the *speaker* is likely to be someone engaged in commerce—that is, generally, the production, distribution, or sale of goods or services—or someone acting on behalf of a person so engaged, and the *intended audience* is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers. Considering the identity of both the speaker and the target audience is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which concerned a speaker engaged in the sale or hire of products or services conveying a message to a person or persons likely to want, and be willing to pay for, that product or service. The high court has frequently spoken of commercial speech as speech proposing a commercial transaction (e.g., *Central Hudson, supra,* 447 U.S. at p. 562), thus implying that commercial speech typically is communication between persons who engage in such transactions.

In *Bolger*, moreover, the court stated that in deciding whether speech is commercial two relevant considerations are advertising format and economic motivation. (*Bolger, supra,* 463 U.S. at pp. 66-67.) These considerations imply that commercial speech generally or typically is directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting. Speech in advertising format typically, although not invariably, is speech about a product or service by a person who is offering that product or service at a price, directed to persons who may want, and be willing to pay for, that product or service. Citing *New York Times v. Sullivan, supra,* 376 U.S. 254, which concerned a newspaper advertisement seeking contributions for civil rights causes, the court cautioned, however, that presentation in advertising format does not necessarily establish that a message is commercial in character. (*Bolger, supra,* at p. 66.) Economic motivation likewise implies

that the speech is intended to lead to commercial transactions, which in turn assumes that the speaker and the target audience are persons who will engage in those transactions, or their agents or intermediaries.

Finally, the factual content of the message should be commercial in character. In the context of regulation of false or misleading advertising, this typically means that the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. This is consistent with, and implicit in, the United States Supreme Court's commercial speech decisions, each of which has involved statements about a product or service, or about the operations or qualifications of the person offering the product or service. (See, e.g., *Rubin v. Coors Brewing Co., supra,* 514 U.S. 476 [statement of alcohol content on beer bottle label]; *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. 136 [statements on an attorney's letterhead and business cards describing attorney's qualifications]; *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748 [advertisements showing prices of prescription drugs].)

This is also consistent with the third *Bolger* factor—product references. By "product references," we do not understand the United States Supreme Court to mean only statements about the price, qualities, or availability of individual items offered for sale. Rather, we understand "product references" to include also, for example, statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product. Similarly, references to services would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services. (See, e.g., *Ibanez v. Florida Dept. of*

Business & Professional Regulation, Bd. of Accountancy, supra, 512 U.S. 136 [statements on an attorney's letterhead and business cards describing attorney's training and qualifications].) This broad definition of "product references" is necessary, we think, to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller.

Our understanding of the content element of commercial speech is also consistent with the reasons that the United States Supreme Court has given for denying First Amendment protection to false or misleading commercial speech. The high court has stated that false or misleading commercial speech may be prohibited because the truth of commercial speech is "more easily verifiable by its disseminator" and because commercial speech, being motivated by the desire for economic profit, is less likely than noncommercial speech to be chilled by proper regulation. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.) This explanation assumes that commercial speech consists of factual statements and that those statements describe matters within the personal knowledge of the speaker or the person whom the speaker is representing and are made for the purpose of financial gain. Thus, this explanation implies that, at least in relation to regulations aimed at protecting consumers from false and misleading promotional practices, commercial speech must consist of factual representations about the business operations, products, or services of the speaker (or the individual or company on whose behalf the speaker is speaking), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services. The United States Supreme Court has never decided whether false statements about a product or service of a competitor of the speaker would properly be categorized as commercial speech. Because the issue is not presented here, we offer no view on how it should be resolved.

Apart from this consideration of the identities of the speaker and the audience, and the contents of the speech, we find nothing in the United States Supreme Court's commercial speech

decisions that is essential to a determination that particular speech is commercial in character in the context of a consumer protection law intended to suppress false or deceptive commercial messages. Although in *Bolger, supra,* 463 U.S. 60, the United States Supreme Court noted that the speech at issue there was in a traditional advertising format, the court cautioned that it was not holding that this factor would always be necessary to the characterization of speech as commercial, and in *Leoni, supra,* 39 Cal.3d 609, this court held that an attorney's mailings were commercial speech even though they were not in the form of an advertisement. (See also *Ibanez v. Florida Dept. of Business & Professional Regulation, Bd. of Accountancy, supra,* 512 U.S. 136 [accepting as commercial speech statements on an attorney's letterhead and business cards].) Thus, advertising format is by no means essential to characterization as commercial speech.

Here, the first element—a commercial speaker—is satisfied because the speakers—Nike and its officers and directors—are engaged in commerce. Specifically, they manufacture, import, distribute, and sell consumer goods in the form of athletic shoes and apparel.

The second element—an intended commercial audience—is also satisfied. Nike's letters to university presidents and directors of athletic departments were addressed directly to actual and potential purchasers of Nike's products, because college and university athletic departments are major purchasers of athletic shoes and apparel. Plaintiff has alleged that Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products. Specifically, plaintiff has alleged that Nike made these statements about its labor policies and practices "to maintain and/or increase its sales and profits." To support this allegation, plaintiff has included as an exhibit a letter to a newspaper editor, written by Nike's director of communications, referring to Nike's labor policies practices and stating that "[c]onsumers are savvy and want to know they support companies with good products and practices" and that "[d]uring the shopping season, we encourage shoppers to

remember that Nike is the industry's leader in improving factory conditions."

The third element—representations of fact of a commercial nature—is also present. In describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations. In speaking to consumers about working conditions and labor practices in the factories where its products are made, Nike addressed matters within its own knowledge. The wages paid to the factories' employees, the hours they work, the way they are treated, and whether the environmental conditions under which they work violate local health and safety laws, are all matters likely to be within the personal knowledge of Nike executives, employees, or subcontractors. Thus, Nike was in a position to readily verify the truth of any factual assertions it made on these topics.

In speaking to consumers about working conditions in the factories where its products are made, Nike engaged in speech that is particularly hardy or durable. Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories. To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by "insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at pp. 772.)

Finally, government regulation of Nike's speech about working conditions in factories where Nike products are made is consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices. Trade regulation laws have traditionally sought to suppress and prevent not only false or misleading statements about products or services in themselves but also false or misleading statements about where a

product was made (see § 17533.7 [making it unlawful to sell a product falsely labeled as "Made in U.S.A."]; 15 U.S.C. § 1125(a) [allowing damages for "false designation of origin"]), or by whom (see § 17520 et seq. [prohibiting false representation of product as made by blind workers]; § 17569 [prohibiting false representation of product "as made by authentic American Indian labor or workmanship"]; Lab. Code, § 1010 et seq. [prohibiting false labeling about the kind, character, or nature of labor employed in product's manufacture]).

Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception. Whether these statements could properly be categorized as commercial speech for some other purpose, and whether these statements could properly be categorized as commercial speech if one or more of these elements was not fully satisfied, are questions we need not decide here.

Nike argues that its allegedly false and misleading statements were not commercial speech because they were part of "an international media debate on issues of intense public interest." In a similar vein, our dissenting colleagues argue that the speech at issue here should not be categorized as commercial speech because, when Nike made the statements defending its labor practices, the nature and propriety of those practices had already become a matter of public interest and public debate. (Dis. opn. of Chin, J., *post*, at p. 6; dis. opn. of Brown, J., *post*, at pp. 4, 7-9.) This argument falsely assumes that speech cannot properly be categorized as commercial speech if it relates to a matter of significant public interest or controversy. As the United States Supreme Court has explained, commercial speech commonly concerns matters of intense public and private interest. The individual consumer's interest in the price, availability, and characteristics of products and services "may be as keen, if not keener by far, than his interest in the day's most urgent po-

litical debate." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 763.) And for the public as whole, information on commercial matters is "indispensable" not only "to the proper allocation of resources in a free enterprise system" but also "to the formation of intelligent opinions as to how that system ought to be regulated or altered." (*Id.* at p. 765; see also *Greater New Orleans Broadcasting Assn., Inc. v. United States, supra,* 527 U.S. at p. 184 [observing that the commercial speech at issue there concerned "an activity that is the subject of intense debate in many communities"].)

In her dissent, Justice Brown states that our logic "erroneously assumes that false or misleading commercial speech . . . can never be speech about a public issue." (Dis. opn. of Brown, J., *post*, at p. 9.) On the contrary, we assume that commercial speech frequently and even normally addresses matters of public concern. The reason that it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" of commercial speech is not that such speech concerns matters of lesser public interest or value, but rather that commercial speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24; accord, *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. at p. __ [121 S.Ct. at p. 2433].)

In support of their argument that speech about issues of public importance or controversy must be considered noncommercial speech, our dissenting colleagues cite *Thomas v. Collins* (1945) 323 U.S. 516, and *Thornhill v. State of Alabama* (1940) 310 U.S. 88. The United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in *Bigelow v. Virginia, supra,* 421 U.S. 809, and *Va. Pharmacy Bd. V. Va. Consumer Council, supra,* 425 U.S. 748. Moreover, neither decision addressed the validity of a law prohibiting false or misleading speech. To the extent they hold that truthful and nonmisleading speech about commercial matters of public importance is entitled to constitutional protection, they are consistent with the modern commercial speech doctrine and with the decision we reach today. We find nothing

in either decision suggesting that the state lacks the authority to prohibit false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations.

For purposes of categorizing Nike's speech as commercial or noncommercial, it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate. The point is illustrated by a decision of a federal court of appeals about statements by a trade association denying there was scientific evidence that eating eggs increased the risk of heart and circulatory disease. (*National Commission on Egg Nutrition v. Federal Trade Commission* (7th Cir. 1977) 570 F.2d 157, 159, cert. den. (1978) 439 U.S. 821.) The court held that these statement were commercial speech subject to regulation by the Federal Trade Commission (FTC) to the extent the statements were false or misleading, even though the trade association made the statements "to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.' " (*Id.* at p. 159.) Responding to the argument that the statements were noncommercial because they concerned a debate on a matter of great public interest, the federal court of appeals responded that "the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates." (*Id.* at p. 163.)

Here, Nike's speech is not removed from the category of commercial speech because it is intermingled with noncommercial speech. To the extent Nike's press releases and letters discuss policy questions such as the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic "globalization" generally, Nike's statements are noncommercial speech. Any content-based regulation of these noncommercial messages would be subject to the strict scrutiny test for fully protected speech. (See, e.g., *Consolidated Edison Co. v. Public Serv. Comm'n, supra,* 447 U.S. 530.) But

Nike may not "immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger, supra,* 463 U.S. at p. 68, fn. omitted.) Here, the alleged false and misleading statements all relate to the commercial portions of the speech in question—the description of actual conditions and practices in factories that produce Nike's products—and thus the proposed regulations reach only that commercial portion.

Asserting that the commercial and noncommercial elements in Nike's statement were "inextricably intertwined," our dissenting colleagues maintain that it must therefore be categorized as noncommercial speech, and they cite in support the United States Supreme Court's decision in *Riley v. National Federation of the Blind of North Carolina* (1988) 487 U.S. 781 (*Riley*). That decision concerned regulation of charitable solicitations, a category of speech that does not fit within our limited-purpose definition of commercial speech because it does not involve factual representations about a product or service that is offered for sale. More importantly, the high court has since explained that in *Riley* "the commercial speech (if it was that) was 'inextricably intertwined' because the state law required it to be included" and that commercial and noncommercial messages are not "inextricable" unless there is some legal or practical compulsion to combine them. (*Board of Trustees, State Univ. of N.Y. v. Fox, supra,* 492 U.S. at p. 474, italics omitted.) No law required Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization, nor was it impossible for Nike to address those subjects separately.

We also reject Nike's argument that regulating its speech to suppress false and misleading statements is impermissible because it would restrict or disfavor expression of one point of view (Nike's) and not the other point of view (that of the critics of Nike's labor practices). The argument is misdirected because the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact. As we have explained, to the extent Nike's speech represents expression of opinion or points of view on general policy questions such as the value of economic "globalization," it is noncommercial speech subject to full First Amendment protection. Nike's speech loses that full measure of protection only when it concerns facts material to commercial transactions—here, factual statements about how Nike makes its products.

Moreover, differential treatment of speech about products and services based on the identity of the speaker is inherent in the commercial speech doctrine as articulated by the United States Supreme Court. A noncommercial speaker's statements criticizing a product are generally noncommercial speech, for which damages may be awarded only upon proof of both falsehood and actual malice. (See, e.g., *Bose Corp. v. Consumers Union of U.S., Inc., supra,* 466 U.S. at p. 513 [so treating unflattering statements in a consumer magazine's review of high fidelity speakers].) A commercial speaker's statements in praise or support of the same product, by comparison, are commercial speech that may be prohibited entirely to the extent the statements are either false or actually or inherently misleading. (*In re R.M.J., supra,* 455 U.S. at p. 203.) To repeat, the justification for this different treatment, as the high court has explained, is that when a speaker promotes its own products, it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" because the described speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24; accord, *Lorillard Tobacco Co. v. Reilly, supra,* 533 U.S. at p. __ [121 S.Ct. at p. 2433].)

Our dissenting colleagues are correct that the identity of the speaker is usually not a proper consideration in regulating speech that is entitled to First Amendment protection, and that a valid regulation of protected speech may not handicap one side of a public debate. But to decide whether a law regulating speech violates the First Amendment, the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all. As we have seen, commercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions.

We conclude, accordingly, that here the trial court and the Court of Appeal erred in characterizing as noncommercial speech, under the First Amendment to the federal Constitution, Nike's allegedly false and misleading statements about labor practices and working conditions in factories where Nike products are made.

We now disapprove as ill-considered dicta two statements of this court in *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501. There we remarked that commercial speech is speech "which has but one purpose—to advance an economic transaction," and we suggested that "an advertisement informing the public that the cherries for sale at store X were picked by union workers" would be noncommercial speech. (*Id.* at p. 511.)

As we have explained, the United States Supreme Court has indicated that economic motivation is relevant but not conclusive and perhaps not even necessary. (*Bolger, supra,* 463 U.S. at p. 67 & fn. 14.) The high court has never held that commercial speech must have as its *only* purpose the advancement of an economic transaction, and it has explained instead that commercial speech may be intermingled with noncommercial speech. (*Id.* at pp. 67-68.) An advertisement primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers.

Nor is speech exempt from the category of commercial speech because it relates to the speaker's labor practices rather than to the price, availability, or quality of the speaker's goods. An advertisement to the public that cherries were picked by union workers is commercial speech if the speaker has a financial or commercial interest in the sale of the cherries and if the information that the cherries had been picked by union workers is likely to influence consumers to buy the speaker's cherries. Speech is commercial in its content if it is likely to influence consumers in their commercial decisions. For a significant segment of the buying public, labor practices do matter in making consumer choices.

B. The California Constitution

In the few cases in which this court has addressed the distinction between commercial and noncommercial speech, we have not articulated a separate test for determining what constitutes commercial speech under the state Constitution, but instead we have used the tests fashioned by the United States Supreme Court. For example, in *Leoni, supra,* 39 Cal.3d 609, we used the three-factor test the high court had articulated in *Bolger, supra,* 463 U.S. 60, and we concluded that the speech in question was commercial speech because two of the three factors were present. So also here, we perceive no need to articulate a separate test for commercial speech under the state Constitution. Having concluded that the speech at issue is commercial speech under the federal Constitution, we now reach the same conclusion under the California Constitution.

V. CONCLUSION

As the United States Supreme Court has explained, false and misleading speech has no constitutional value in itself and is protected only in circumstances and to the extent necessary to give breathing room for the free debate of public issues. Commercial speech, because it is both more readily verifiable by its speaker and more hardy than noncommercial speech, can be effectively regulated to suppress false and actually or inherently misleading messages without undue risk of chilling public debate. With these basic principles in mind, we conclude that when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.

Sprinkled with references to a series of children's books about wizardry and sorcery, Justice Brown's dissent itself tries to find the magic formula or incantation that will transform a business enterprise's factual representations in defense of its own products and profits into noncommercial speech exempt from our state's consumer protection laws. As we have explained, however, such representations, when aimed at potential

buyers for the purpose of maintaining sales and profits, may be regulated to eliminate false and misleading statements because they are readily verifiable by the speaker and because regulation is unlikely to deter truthful and nonmisleading speech.

In concluding, contrary to the Court of Appeal, that Nike's speech at issue here is commercial speech, we do not decide whether that speech was, as plaintiff has alleged, false or misleading, nor do we decide whether plaintiff's complaint is vulnerable to demurrer for reasons not considered here. Because the demurrers of Nike and the individual defendants were based on multiple grounds, further proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both. Our decision on the narrow issue before us on review does not foreclose those proceedings.

The judgment of the Court of Appeal is reversed, and the matter is remanded to that court for further proceedings consistent with this opinion.

KENNARD, J.

WE CONCUR
GEORGE, C.J.
WERDEGAR, J.
MORENO, J.

DISSENTING OPINION BY CHIN, J.

I respectfully dissent.

Nike, Inc. (Nike), is a major international corporation with a multibillion dollar enterprise. The nature of its labor practices has become a subject of considerable public interest and scrutiny. Various persons and organizations have accused Nike of engaging in despicable practices, which they have described sometimes with such caustic and scathing words as "slavery" and "sweatshop." Nike's critics and these accusations receive full First Amendment protection. And well they should. "The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . .' " (*Garrison v. Louisiana* (1964) 379 U.S. 64, 75 (*Garrison*), quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.) "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340, fn. omitted.)

While Nike's critics have taken full advantage of their right to " 'uninhibited, robust, and wide-open' " debate (*Garrison*, *supra*, 379 U.S. at p. 75), the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy. Why is this, according to the majority? Because Nike competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods. And because Nike sells shoes—and its defense against critics may help sell those shoes—the majority asserts that Nike may not freely engage in the debate, but must run the risk of lawsuits under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) and false advertising law (Bus. & Prof. Code, § 17500 et seq.), should it ever make a factual claim that turns out to be inaccurate. According to the majority, if Nike utters a factual misstatement, unlike its critics, it may be sued for restitution, civil penalties, and injunctive relief under these sweeping statutes. (Maj. opn., *ante*, at pp. 6-8.)

Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. Full free speech protection for one side and strict liability for the other will hardly promote vigorous and meaningful debate. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." (*Garrison*, *supra*, 379 U.S. at p. 73.) The state, "even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and ro-

bust debate cannot thrive if directed by the government." (*Riley v. National Federation of Blind* (1988) 487 U.S. 781, 791 (*Riley*).)

In its pursuit to regulate Nike's speech—in hope of prohibiting false and misleading statements—the majority has unduly trammeled basic constitutional freedoms that form the foundation of this free government.[1] "[W]here ... suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 785-786 (*Bellotti*), fn. omitted.)

I. IRRESPECTIVE OF NIKE'S ECONOMIC MOTIVATION, THE PUBLIC HAS A RIGHT TO RECEIVE INFORMATION ON MATTERS OF PUBLIC CONCERN

The United States Supreme Court has emphasized that economic motivation—in this case, Nike's desire to sell athletic products—is not a dispositive factor in determining whether certain speech is commercial. (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 67 (*Bolger*).) In deciding the scope of the constitutional protection of corporate speech, the high court struck down a Massachusetts criminal statute that proscribed corporations from giving campaign contributions to influence the vote on a referendum materially affecting the corporation's property, business, or assets. (*Bellotti, supra,* 435 U.S. 765.) Corporate speech, the high court noted, did not deserve less protection simply because of its source. "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." (*Id.* at p. 778.) In Nike's case, based on the majority's holding, it does.

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[1] I take no sides in this public debate. Who is right and who is wrong is not for me, or the majority, to decide. It is for the public—fully informed as the First Amendment guarantees—to judge. (*Gertz v. Robert Welch, Inc., supra,* 418 U.S. at pp. 339-340.)

As the Court of Appeal below noted, given Nike's powerful corporate image and industry stronghold, the private company "exemplifi[ed] the perceived evils or benefits of labor practices associated with the processes of economic globalization." Nike, in effect, became the "poster child" in the international campaign for labor rights and reform (see, e.g., Note, *Now Playing: Corporate Codes of Conduct in the Global Theater: Is Nike Just Doing It?* (1998) 15 Ariz. J. Intl. & Comp. L. 905), and Nike's labor practices became relevant in a much broader and public context. Though expressions on labor disputes have been afforded full First Amendment protection (see *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 762 (*Va. Pharmacy Bd.*), and cited cases; *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-103 (*Thornhill*)), the majority loses sight of the full protections afforded this speech in the face of Nike's corporate identity. (*Bellotti, supra,* 435 U.S. at p. 778.) And because of this myopia, the public loses.

The public at large, in addition to Nike's actual and intended customers, has the right to receive information from both sides of this international debate. "Freedom of speech presupposes a willing speaker. But where a speaker exists ... the protection afforded is to the communication, to its source and to its recipients both." (*Va. Pharmacy Bd., supra,* 425 U.S. at p. 756, fn. omitted.) The First Amendment serves an "informational purpose" that guarantees "the public access to discussion, debate, and the dissemination of information and ideas." (*Bellotti, supra,* 435 U.S. at p. 782, fn. 18; *id.* at p. 783; see *Bigelow v. Virginia* (1975) 421 U.S. 809, 822 (*Bigelow*).) Thus, not only Nike, but all of us, are the poorer for the majority's assault on free speech.

In striking down Virginia's attempt to ban a newspaper advertisement announcing the availability of legal New York abortions, the high court noted: "The advertisement ... did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.' Portions of its message ... involve the exercise of the freedom of communicating information and disseminating opinion. [¶] Viewed in its entirety, the advertisement conveyed information of potential interest and

value to a diverse audience—*not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia.* . . . Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public." (*Bigelow*, *supra*, 421 U.S. at p. 822, fn. omitted, italics added; *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 370-371 [following *Bigelow*]; cf. *Bolger*, *supra*, 463 U.S. at p. 68 [company may not "immunize false or misleading product information from government regulation simply by including references to public issues"].)

Here, Nike's statements regarding its labor practices in China, Thailand, and Indonesia provided vital information on the very public controversy concerning using low-cost foreign labor to manufacture goods sold in America. Nike's responses defended against adverse reports that its overseas manufacturers committed widespread labor, health, and safety law violations. Far from promoting the sale of its athletic products, Nike did not include this information through product labels, inserts, packaging, or commercial advertising intended to reach only Nike's actual or potential customers. Rather, Nike responded to the negative publicity through press releases, letters to newspapers, and letters to university presidents and athletic directors. (Cf. *Bolger*, *supra*, 463 U.S. 60 [contraceptive manufacturer's informational pamphlets included with advertisements deemed commercial speech].) To the extent Nike may have been financially motivated to defend its business and livelihood against these attacks, this motivation is not dispositive in identifying speech as commercial. (*Bolger*, *supra*, 463 U.S. at p. 67.) "Viewed in its entirety, [Nike's speech] conveyed information of potential interest and value to a diverse audience . . . ." (*Bigelow*, *supra*, 421 U.S. at p. 822.)

II. NIKE'S SPEECH IS NOT TRADITIONAL COMMERCIAL SPEECH

Indeed, characterizing Nike's speech here as commercial speech is inconsistent with the high court's constitutional jurisprudence for yet another reason.[2] The high court has stated that traditional commercial speech is speech that " 'does "no more than propose a commercial transaction." ' " (*Va. Pharmacy Bd.*, *supra*, 425 U.S. at p. 762; *Bolger*, *supra*, 463 U.S. at p. 66; see also *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 473; *Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 637; but see *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 561 [commercial speech is "expression related solely to the economic interests of the speaker and its audience"].) In this case, Nike's speech here went beyond proposing a commercial transaction. It provided information vital to the public debate on international labor rights and reform. As the Court of Appeal below observed, "[i]nformation about the labor practices at Nike's overseas plants . . . constitute[d] data relevant to a controversy of great public interest in our times."

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[2] While the majority correctly observes that in this constitutional analysis, "the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all" (maj. opn., *ante*, at p. 31), it conflates this question with the issue whether commercial speech may be regulated, the latter a foregone conclusion. (*Bolger*, *supra*, 463 U.S. at p. 65.) Advocating what it calls a "limited-purpose" definition of commercial speech (maj. opn., *ante*, at pp. 20, 29), the majority proposes that a company's factual statements about its products or services are commercial and subject to regulation if these statements are "false or misleading." (*Id.* at p. 31.) In other words, the majority concludes "a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions." (*Ibid.*) Whether a company's statements are allegedly false or misleading does not determine the threshold question at issue in this case—whether the speech is commercial or noncommercial. (See *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 566.)

Contrary to the majority's assertions (see maj. opn., *ante*, at p. 29), the high court's restriction—" 'advertising which "links a product to a current public debate" is not thereby entitled to the constitutional protection afforded noncommercial speech' " (*Bolger*, *supra*, 463 U.S. at p. 68)—does not apply here. In *Bolger*, the informational mailings, though containing issues of public concern such as venereal disease and family planning, were at bottom commercial speech directed at selling contraceptives. (*Id.* at p. 66.) The court made clear that most of the mailings fell "within the core notion of commercial speech—'speech which does "no more than propose a commercial transaction." ' " (*Ibid.*) To the extent that some mailings discussed public concerns, the high court cautioned that "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (*Id.* at p. 68.)

In a case decided before *Bolger*, the high court held that a utility company's monthly electric bill inserts advocating the use of nuclear power, could not be regulated under the First and Fourteenth Amendments. (*Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530 (*Consolidated Edison*).) In *Consolidated Edison*, the high court did not address whether the inserts constituted commercial speech. Rather, it concluded that the utility commission's regulation banning the inserts "limited the means by which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak." (*Id.* at p. 535.) Despite Consolidated Edison's obvious economic incentive in promoting the use of nuclear power, the high court did not consider, must less determine, whether the inserts placed in electric bills amounted to commercial speech.

The high court's concern in *Bolger*, *supra*, 463 U.S. 60, therefore, was that advertisers refrain from inserting information on public issues *as a pretext* to avoid regulations governing their

commercial speech.[3] That is simply not the case here. Nike's speech—in the form of press releases and letters defending against accusations about its overseas labor practices—was not in any sense pretextual, but prompted and necessitated by public criticism. As noted, Nike did not use product labels, packaging, advertising, or other media intended to directly reach its actual or potential customers. Nike's speech did not "simply . . . include[] references to public issues." (*Bolger*, *supra*, 463 U.S. at p. 68.) Nike's labor practices and policies, and in turn, its products, *were* the public issue. Its "discussion of controversial issues strikes at the heart of the freedom to speak." (*Consolidated Edison*, *supra*, 447 U.S. at p. 535.)

At the very least, this case typifies the circumstance where commercial speech and noncommercial speech are "inextricably intertwined." (*Riley*, *supra*, 487 U.S. at p. 796.) In *Riley*, the high court held that a North Carolina statute regulating solicitation of charitable contributions affected protected speech and was not narrowly tailored to meet the state's interest in protecting charities from fraud. (*Id.* at p. 789.) As relevant here, the court observed that even if a professional fundraiser's speech amounted to commercial speech, "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." (*Id.* at p. 796.) It further held that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial

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[3] The phrase " 'does "no more than propose a commercial transaction" ' " (*Bolger*, *supra*, 463 U.S. at p. 66) "must be understood to reflect judgments about 'the character of the expressive activity' at issue judgments that necessarily entail an assessment of the nature and constitutional significance of the larger social practice within which that activity is embedded. That is why commercial speech cannot be transformed into public discourse merely by altering its content to insert assertions about matters of public concern." (Post, *The Constitutional Status of Commercial Speech* (2000) 48 U.C.L.A. L.Rev. 1, 18-19, fns. omitted.)

and impractical. Therefore, we apply our test for fully protected expression." (*Ibid.*)

Notwithstanding the fact that *Riley* dealt with charitable solicitations, which are not involved in this case, the high court relied, in part, on a case that provides insight here. (*Riley*, *supra*, 487 U.S. at p. 796, citing *Thomas v. Collins* (1945) 323 U.S. 516, 540-541 (*Thomas*).) In *Thomas*, which did not deal with solicitation of property or funds, the high court addressed the issue whether a union organizer's speech soliciting members was protected by the First Amendment, and whether a registration requirement in order to speak was constitutionally impermissible. (*Thomas*, *supra*, 323 U.S. at pp. 533-534.) Answering *yes* to both questions, the high court cautioned that a state's regulation, "whether aimed at fraud or other abuses, must not trespass upon the domain set apart for free speech and free assembly. This Court has recognized that 'in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' " (*Id.* at p. 532, quoting *Thornhill*, *supra*, 310 U.S. at pp. 102, 103.)[4]

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[4] Contrary to the majority's suggestion (maj. opn., *ante*, at p. 27), the fact that the high court decided both *Thornhill*, *supra*, 310 U.S. 88, and *Thomas*, *supra*, 323 U.S. 516, before its seminal cases on commercial speech, does not make these earlier cases' affirmation of fundamental principles on First Amendment protection less pertinent. Indeed, the high court relied, in part, on *Thornhill*, *supra*, 310 U.S. at page 102, in *Va. Pharmacy Bd.*, *supra*, 425 U.S. at page 762, to conclude that "[t]he interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome."

This case resembles *Thomas* in that Nike's speech provided information " 'concerning the conditions in [the manufacturing] industry' " and thereby used " 'the processes of popular government to shape the destiny of modern industrial society.' [Citation.]" (*Thomas*, *supra*, 323 U.S. at p. 532, quoting *Thornhill*, *supra*, 310 U.S. at p. 102.) Nike, which came to the forefront of the international labor abuse debate, provided relevant information about its labor practices in its overseas plants. Nike's speech, in an attempt to influence public opinion on economic globalization and international labor rights and working conditions, gave the public insight and perspective into the debate. This speech should be fully protected as "essential to free government." (*Thornhill*, *supra*, 310 U.S. at p. 95.)

The majority's attempt to parse out Nike's noncommercial speech—"*to the extent* Nike's speech represents expression of opinion or points of view on general policy questions . . . it is noncommercial speech" (maj. opn., *ante*, at p. 30, italics added)—is both unavailing and unhelpful. Even assuming that Nike's factual statements regarding how its products are made constitute commercial speech, that speech is "inextricably intertwined" with its noncommercial speech. (*Riley*, *supra*, 487 U.S. at p. 796.) Contrary to the majority's suggestion (maj. opn., *ante*, at pp. 29-30), Nike realistically could not discuss its general policy on employee rights and working conditions and its views on economic globalization *without* reference to the labor practices of its overseas manufacturers, Nike products, and how they are made. Attempting to parse out the commercial speech from the noncommercial speech in this context "would be both artificial and impractical." (*Riley*, *supra*, 487 U.S. at p. 796)

III. CONCLUSION

The majority today refuses to honor a fundamental commitment and guarantee that both sides in a public debate may compete vigorously—and equally—in the marketplace of ideas. The First Amendment ensures the freedom to speak on matters of public interest by *both* sides, not just one judicially favored. (*Bellotti*, *supra*, 435 U.S. at pp. 785-786.) Sadly, Nike is not the only one who loses here—the public does, too. "Those who won our independence had confidence in the power of free and

fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion." (*Thornhill*, *supra*, 310 U.S. at p. 95.)

Because I would give *both* sides in this important public controversy the full protection that our Constitution guarantees, I respectfully dissent.

CHIN, J.

I CONCUR:

BAXTER, J.

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

I

In 1942, the United States Supreme Court, like a wizard trained at Hogwarts, waved its wand and "plucked the commercial doctrine out of thin air." (Kozinski & Banner, *Who's Afraid of Commercial Speech* (1990) 76 Va. L.Rev. 627, 627.) Unfortunately, the court's doctrinal wizardry has created considerable confusion over the past 60 years as it has struggled to define the difference between commercial and noncommercial speech. The United States Supreme Court has, in recent years, acknowledged "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." (*City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 419 (*Discovery Network*).) After tracing the various definitions of commercial speech used over the years, the court conceded that no "categorical definition of the difference between" commercial and noncommercial speech exists. (*Id.* at pp. 420-423.) Instead, the difference is a matter of " 'common[]sense' " (*Ohralik v. Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456 (*Ohralik*)), and restrictions on speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not

inadvertently suppressed." (*Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60, 66, fn. omitted (*Bolger*).) Consistent with these pronouncements, the United States Supreme Court has expressly refused to define the elements of commercial speech. (See *id.* at p. 67, fn. 14.) Indeed, "the impossibility of specifying the parameters that define the category of commercial speech has haunted its jurisprudence and scholarship." (Post, *The Constitutional Status of Commercial Speech* (2000) 48 UCLA L.Rev. 1, 7.)

Despite this chaos, the majority, ostensibly guided by *Bolger*, has apparently divined a new and simpler test for commercial speech. Under this "limited-purpose test," "categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." (Maj. opn., *ante*, at p. 20.) Unfortunately, the majority has forgotten the teachings of H.L. Mencken: "every human problem" has a "solution" that is "neat, plausible, and wrong." (Mencken, *Prejudices: Second Series* (1977 reprint) p. 148.) Like the purported discovery of cold fusion over a decade ago, the majority's test for commercial speech promises much, but solves nothing. Instead of clarifying the commercial speech doctrine, the test violates fundamental principles of First Amendment jurisprudence by making the level of protection given speech dependent on the identity of the speaker—and not just the speech's content—and by stifling the ability of certain speakers to participate in the public debate. In doing so, the majority unconstitutionally favors some speakers over others and conflicts with the decisions of other courts.

Contrary to the majority's belief, our current First Amendment jurisprudence defies any simple solution. Under the commercial speech doctrine currently propounded by the United States Supreme Court, all speech is *either* commercial or noncommercial, and commercial speech receives less protection than noncommercial speech. (*Central Hudson Gas & Ele. Corp. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 562-563 (*Central Hudson*).) The doctrine further assumes that all commercial speech is the *same* under the First Amendment. Thus, all com-

mercial speech receives the *same* level of lesser protection. The state may therefore ban *all* commercial speech "that is fraudulent or deceptive without further justification" (*Edenfield v. Fane* (1993) 507 U.S. 761, 768), but may not do the same to fraudulent or deceptive speech in " 'matters of public concern' " (*Dun & Bradstreet, Inc. v. Greenmoss Builders* (1985) 472 U.S. 749, 758-759 (plur. opn. of Powell, J.) (*Dun & Bradstreet*), quoting *First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 776 (*Bellotti*)).

This simple categorization presupposes that commercial speech is wholly distinct from noncommercial speech and that all commercial speech has the same value under the First Amendment. The reality, however, is quite different. With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking. As several commentators have observed, examples of the intersection between commercial speech and various forms of noncommercial speech, including scientific, political and religious speech, abound. (See, e.g., Kozinski & Banner, *Who's Afraid of Commercial Speech*, *supra*, 76 Va. L.Rev. at pp. 639-648; Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech* (1990) 43 Vand. L.Rev. 1433, 1449-1454.) Indeed, the recent commissioning of a Fay Weldon novel by the jewelry company Bulgari as a marketing ploy highlights this blurring of commercial and noncommercial speech. (See Arnold, *Making Books: Placed Products, and Their Cost*, N.Y. Times (Sept. 13, 2001) p. E3, col. 1.)

Although the world has become increasingly commercial, the dichotomous nature of the commercial speech doctrine remains unchanged. The classification of speech as commercial or noncommercial determines the level of protection accorded to that speech under the First Amendment. Thus, the majority correctly characterizes the issue as "whether defendant corporation's false statements are commercial or noncommercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions." (Maj. opn., *ante*, at p. 1.) If

Nike's press releases, letters and other documents are commercial speech, then the application of Business and Professions Code sections 17204 and 17535[1]—which establish strict liability for false and misleading ads—is constitutional. Otherwise, it is not.

Constrained by this rigid dichotomy, I dissent because Nike's statements are more like noncommercial speech than commercial speech. Nike's commercial statements about its labor practices cannot be separated from its noncommercial statements about a public issue, because its labor practices *are* the public issue. Indeed, under the circumstances presented in this case, Nike could hardly engage in a general discussion on overseas labor exploitation and economic globalization without discussing its own labor practices. (See *Thomas v. Collins* (1945) 323 U.S. 516, 534-535.) Thus, the commercial elements of Nike's statements are "inextricably intertwined" with their noncommercial elements. (*Riley v. National Federation of Blind* (1988) 487 U.S. 781, 796 (*Riley*).) This court should therefore "apply [the] test for fully protected expression," notwithstanding the majority's specious distinctions of the relevant case law. Under this test, a categorical ban on all false and misleading statements made by Nike about its labor practices violates the First Amendment.

Although this result follows from controlling United States Supreme Court precedent, I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries. My sentiments are not unique; many judges and academics have echoed them. (See, e.g., Kozinski & Banner, *The Anti-History and Pre-History of Commercial Speech* (1993) 71 Tex. L.Rev. 747; Kozinski & Banner, *Who's Afraid of Commercial Speech*, *supra*, 76 Va. L.Rev. at p. 627; Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free*

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[1] All further statutory references are to the Business and Professions Code.

Expression (1971) 39 Geo. Wash. L.Rev. 429.) Even some justices on the high court have recently questioned the validity of the distinction between commercial and noncommercial speech. (See *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 522 (conc. opn. of Thomas, J.) ["I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech"]; *id.* at p. 517 (conc. opn. of Scalia, J.) ["I share Justice Thomas's discomfort with the *Central Hudson* test"].) Nonetheless, the high court has apparently declined to abandon it. (See, e.g., *Greater New Orleans Broadcasting Assn., Inc. v. United States* (1999) 527 U.S. 173, 183 (*Greater New Orleans Broadcasting*) [applying the *Central Hudson* test to restrictions on commercial speech].) Given that the United States Supreme Court is not prepared to start over, we must try to make the commercial speech doctrine work—warts and all. To this end, I believe the high court needs to develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate while minimizing consumer fraud.

II

According to the majority, all speech containing the following three elements is commercial speech: (1) "a commercial speaker" (maj. opn., *ante*, at p. 24); (2) "an intended commercial audience" (*ibid.*); and (3) "representations of fact of a commercial nature" (*ibid.*). The first element is satisfied whenever the speaker is engaged in "the production, distribution, or sale of goods or services" "or someone acting on behalf of a person so engaged." (*Id.* at p. 20.) The second element is satisfied whenever the intended audience is "actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." (*Ibid.*) The third element is satisfied whenever "the speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of,

or other commercial transactions in, the speaker's products or services." (*Id.* at p. 21.)

Although the majority constructed this limited-purpose test from its "close reading of the high court's commercial speech decisions" (maj. opn., *ante*, at p. 20), it conveniently dismisses those decisions that cast doubt on its formulation. As explained below, a closer review of the relevant case law reveals that the majority's test for commercial speech contravenes long-standing principles of First Amendment law.

First, the test flouts the very essence of the distinction between commercial and noncommercial speech identified by the United States Supreme Court. "If commercial speech is to be distinguished, it 'must be distinguished *by its content.*' " (*Bates v. State Bar of Ariz.* (1977) 433 U.S. 350, 363, italics added (*Bates*), quoting *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 761 (*Va. Consumer Council*).) Despite this caveat, the majority distinguishes commercial from noncommercial speech using two criteria wholly unrelated to the speech's content: the identity of the speaker and the intended audience. (See maj. opn., *ante*, at p. 20.) In doing so, the majority strays from the guiding principles espoused by the United States Supreme Court.

Second, the test contravenes a fundamental tenet of First Amendment jurisprudence by making the identity of the speaker potentially dispositive. As the United States Supreme Court stated long ago, "[the] identity of the speaker is not decisive in determining whether speech is protected" (*Pacific Gas & Electric Co. v. Public Utilities Comm'n* (1986) 475 U.S. 1, 8 (plur. opn. of Powell, J.) (*Pacific Gas & Electric*)), and "speech does not lose its protection because of the corporate identity of the speaker" (*id.* at p. 16). This is because corporations and other speakers engaged in commerce "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (*Id.* at p. 8, quoting *Bellotti*, *supra*, 435 U.S. at p. 783.) Thus, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon *the identity of its source*, whether corporation, association, union, or individual." (*Bellotti*, at p. 777, italics

added.) Despite these admonitions, the majority has made the identity of the speaker a significant, and potentially dispositive, factor in determining the scope of protection accorded to speech under the First Amendment. (See maj. opn., *ante*, at p. 20.) As a result, speech by "someone engaged in commerce" may receive less protection solely because of the speaker's identity. (*Ibid.*) Indeed, the majority's limited-purpose test makes the identity of the speaker dispositive whenever the speech at issue relates to the speaker's business operations, products, or services, in contravention of United States Supreme Court precedent. (See *Pacific Gas & Electric*, *supra*, 475 U.S. at p. 8 (plur. opn. of Powell, J.).)

Third, the test violates the First Amendment by stifling the ability of speakers engaged in commerce, such as corporations, to participate in debates over public issues. The United States Supreme Court has broadly defined public issues as those issues "about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." (*Thornhill v. Alabama* (1940) 310 U.S. 88, 102.) "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled . . . ." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 269 (*New York Times*).) "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection" (*Connick v. Myers* (1983) 461 U.S. 138, 145), because such speech "is more than self-expression; it is the essence of self-government" (*Garrison v. Louisiana* (1964) 379 U.S. 64, 74-75). "The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .' " (*Consolidated Edison Co. v. Public Serv. Comm'n of New York* (1980) 447 U.S. 530, 534 (*Consolidated Edison*), quoting *Cohen v. California* (1971) 403 U.S. 15, 24.) Thus, the First Amendment "both fully protects and implicitly encourages" public debate on " 'matters of public concern.' " (*Pacific Gas & Electric*, *supra*, 475 U.S. at p. 9 (plur. opn. of

Powell, J.), quoting *Thornill v. Alabama*, *supra*, 310 U.S. . 101.)

To ensure "uninhibited, robust, and wide-open" "deba on public issues" (*New York Times*, *supra*, 376 U.S. at p. 270), the United States Supreme Court has recognized that some false o misleading speech must be tolerated. Although "[u]ntruthfu speech, commercial or otherwise, has never been protected fo its own sake" (*Va. Consumer Council*, *supra*, 425 U.S. at p. 771), "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters" (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 341 (*Gertz*)). The "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' . . . ." (*New York Times*, *supra*, 376 U.S. at pp. 271-272, quoting *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 433.) Because "a rule that would impose strict liability on a" speaker "for false factual assertions" in a matter of public concern "would have an undoubted 'chilling' effect" on speech "that does have constitutional value" (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 52), "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions" (*Garrison v. Louisiana*, *supra*, 379 U.S. at p. 74).

The majority contends its limited-purpose test for commercial speech does not violate these principles because false or misleading commercial speech may be prohibited "entirely." (Maj. opn., *ante*, at p. 12.) This logic is, however, faulty, because it erroneously assumes that false or misleading commercial speech as defined by the majority can never be speech about a public issue. Under the majority's test, the content of commercial speech is limited only to representations regarding "business operations, products, or services." (Maj. opn., *ante*, at p. 21.) But business operations, products, or services may be public issues. For example, a corporation's business operations may be the subject of public debate in the media. These operations may even be a political issue as organizations, such as state, local, or student governments, propose and pass resolu-

tions condemning certain business practices. Under these circumstances, the corporation's business operations undoubtedly become a matter of public concern, and speech about these operations merits the full protection of the First Amendment. (See *Thornhill v. Alabama*, *supra*, 310 U.S. at p. 102.) Indeed, the United States Supreme Court has long recognized that speech on a public issue may be inseparable from speech promoting the speaker's business operations, products or services. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 535-536 [recognizing that a union representative could not discuss the benefits of unionism without hawking the union's services].)

The majority, however, creates an overbroad test that, taken to its logical conclusion, renders all corporate speech commercial speech. As defined, the test makes any public representation of fact by a speaker engaged in commerce about that speaker's products made for the purpose of promoting that speaker's products commercial speech. (See maj. opn., *ante*, at pp. 20-26.) A corporation's product, however, includes the corporation itself. Corporations are regularly bought and sold, and corporations market not only their products and services but also themselves. Indeed, business goodwill is an important asset of every corporation and contributes significantly to the sale value of the corporation. Because all corporate speech about a public issue reflects on the corporate image and therefore affects the corporation's business goodwill and sale value, the majority's test makes all such speech commercial notwithstanding the majority's assertions to the contrary. (See maj. opn., *ante*, at pp. 28-29.)

In so doing, the majority violates a basic principle of First Amendment law. (*Consolidated Edison*, *supra*, 447 U.S. at p. 535 [restrictions on the means by which a corporation "may participate in the public debate" "strike[] at the heart of the freedom to speak"].) By subjecting all corporate speech about business operations, products and services to the strict liability provisions of sections 17204 and 17535, the majority's limited-purpose test unconstitutionally chills a corporation's ability to participate in the debate over matters of public concern. (See *Garrison v. Louisiana*, *supra*, 379 U.S. at p. 74.) The chilling effect is exacerbated by the breadth of sections 17204 and 17535, which "prohibit 'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or *which has a capacity, likelihood or tendency to deceive or confuse the public.*' " (Maj. opn., *ante*, at p. 8, italics added, quoting *Leoni v. State Bar* (1985) 39 Cal.3d 609, 626 (*Leoni*).) This broad definition of actionable speech puts a corporation "at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning." (*Thomas v. Collins*, *supra*, 323 U.S. at p. 535.) Because the corporation could never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue, "[m]uch valuable information which a corporation might be able to provide would remain unpublished . . . ." (*Bellotti*, *supra*, 435 U.S. at p. 785, fn. 21.) As the United States Supreme Court has consistently held, such a result violates the First Amendment! (*Ibid.*)

Finally, in singling out speakers engaged in commerce and restricting their ability to participate in the public debate, the majority unconstitutionally favors certain speakers over others. Corporations "have the right to be free from government restrictions that abridge [their] own rights in order to 'enhance the relative voice' of [their] opponents." (*Pacific Gas & Electric*, *supra*, 475 U.S. at p. 14 (plur. opn. of Powell, J.), quoting *Buckley v. Valeo* (1976) 424 U.S. 1, 49 & fn. 55.) The First Amendment does not permit favoritism toward certain speakers "based on the identity of the interests that [the speaker] may represent." (*Bellotti*, *supra*, 435 U.S. at p. 784.) Indeed, "self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " (*Id.* at p. 777, fn. 12, quoting *Associated Press v. United States* (1945) 326 U.S. 1, 20.) The majority, however, does just that. Under the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations pursuant to sections 17204 and 17535. Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements. Neither United States

Supreme Court precedent nor our precedent countenances such favoritism in doling out First Amendment rights.

III

The majority's limited-purpose test is not only problematic in light of controlling high court precedent, the test appears to conflict with the analysis used by other courts in analogous contexts. These conflicts belie the majority's claim of doctrinal consistency and underscore the illusory nature of its so-called solution to the commercial speech quandary.

For example, the majority opinion conflicts with *Gordon & Breach Science Publishers v. AIP* (S.D.N.Y. 1994) 859 F.Supp. 1521 (*Gordon & Breach*). In *Gordon & Breach*, the defendant, a nonprofit publisher of scientific journals, published scientific articles touting its journals as "both less expensive and more scientifically important than those of for-profit publishers such as" the plaintiff. (*Id.* at p. 1525.) The defendant, as part of an advertising campaign designed to promote its journals, touted and defended the conclusions of these articles by, among other things, issuing press releases and writing letters to the editor responding to attacks on these articles. (*Id.* at pp. 1526-1527.) In light of these promotional activities, the plaintiff sued the defendant for false advertising under the Lanham Trademark Act (15 U.S.C. § 1125(a)) and New York law.

In determining whether the defendant's advertising campaign constituted commercial speech, the district court identified the following dilemma: how to characterize "speech which, from one perspective, presents the aspect of protected, noncommercial speech addressing a significant public issue, but which, from another perspective, appears primarily to be speech 'proposing a commercial transaction.' " (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1539.) After analyzing the relevant United States Supreme Court precedent, the court concluded that the articles, press releases and letters to the editor constituted noncommercial speech fully protected by the First Amendment.

(See *id.* at pp. 1543-1544.)[2] According to the court, this speech fell "too close to core First Amendment values to be considered 'commercial advertising or promotion' under the Lanham Act." (*Id.* at p. 1544.)

Application of the majority's test would, however, result in a different outcome. The defendant was engaged in commerce; it sold journals. The intended audience was undoubtedly potential customers. The articles, press releases and letters contained representations of fact about the defendant's products—its journals. Thus, they contain the three elements of commercial speech identified by the majority. The majority would therefore classify this speech as commercial speech even though it constitutes "fully protected commentary on an issue of public concern." (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Similarly, the majority's test creates a conflict with *Oxycal Laboratories, Inc. v. Jeffers* (S.D.Cal. 1995) 909 F.Supp. 719. In *Oxycal*, the defendants published a book that denigrated the plaintiffs' products while promoting the defendants' products. The defendants allegedly promoted the book in an effort to boost the sales of their own products. The plaintiffs sued, alleging false advertising. (See *id.* at pp. 720-721.) Finding this case easy, the court concluded that the book was noncommercial speech because there were "sufficient noncommercial motivations" notwithstanding the commercial motivations. (*Id.* at pp. 724-725.) To the extent the book contained commercial elements promoting the defendants' products, these commercial elements were "intertwined" with and secondary to the noncommercial elements. (*Id.* at p. 725.)

Once again, the majority's test would yield a contrary result. The defendants were engaged in commerce, and the intended audience for the book was potential consumers. The book con-

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[2] The court did find that the defendant's distribution of preprints of the articles to potential customers and its repeated dissemination of the conclusions of these articles to potential customers constituted commercial speech. (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

tained representations of fact about the defendants' products, and the defendants undoubtedly made these representations for the purpose of promoting their products. Thus, under the majority's test, the book was commercial speech, and the defendants would have been strictly liable for any false or misleading statements about their products in the book.

Although we are not bound by these decisions, they are instructive and highlight the deficiencies in the majority's limited-purpose test for commercial speech. In divining a new test for commercial speech, the majority finds a deceptively simple answer to a complicated question. Unfortunately, the answer is flawed. By failing to recognize that a speaker's business operations, products, or services may be matters of public concern, the majority ignores controlling principles of First Amendment law. As a result, the majority erroneously draws a bright line when "a broader and more nuanced inquiry" is required. (*Gordon & Breach*, *supra*, 859 F.Supp. at p. 1537; see also *id.* at p. 1540, fn. 7.)

IV

Of course, my rejection of the majority's limited-purpose test does not resolve the central issue in this case: What level of protection should be accorded to Nike's speech under the First Amendment? To answer this question, this court, as the majority correctly notes, must determine whether Nike's speech is commercial or noncommercial speech. Following the existing framework set up by the United States Supreme Court, I would conclude that Nike's speech is more like noncommercial speech than commercial speech because its commercial elements are inextricably intertwined with its noncommercial elements. Thus, I would give Nike's speech the full protection of the First Amendment.

When determining whether speech is commercial or noncommercial, courts must "ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." (*Bolger*, *supra*, 463 U.S. at p. 66, fn. 11.) In following this philosophy in cases involving hybrid speech containing both commercial and noncommercial elements, the United

States Supreme Court has assessed the separability of these elements to determine the proper level of protection. If the commercial elements are separable from the noncommercial elements, then the speech is commercial and receives lesser protection. Thus, advertising that merely "links a product to a current public debate" is still commercial speech notwithstanding its noncommercial elements. (*Central Hudson*, *supra*, 447 U.S. at p. 563, fn. 5.) Where the speaker may comment on a public issue without promoting its products or services, the speech is also commercial, even if the speaker combines a commercial message with a noncommercial message. (See *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 474 (*Fox*) [speaker did not have to combine its sales pitch for Tupperware with its home economics lessons].) Indeed, "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." (*Bolger*, at p. 68.)

The United States Supreme Court has, however, recognized that commercial speech may be "inextricably intertwined" with noncommercial speech in certain contexts. (*Riley*, *supra*, 487 U.S. at p. 796.) Where regulation of the commercial component of certain speech would stifle otherwise protected speech, "we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical." (*Ibid.*) In such cases, courts must apply the "test for fully protected expression" rather than the test for commercial speech.[3] (*Ibid.*)

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[3] The majority's attempts to distinguish *Riley* are not persuasive. First, "charitable solicitations" *do* "involve factual representations about a product or service that is offered for sale" (maj. opn., *ante*, at p. 29), where, as in *Riley*, the charitable solicitations are made by professional fundraisers who solicit contributions for a fee (see *Riley*, *supra*, 487 U.S. at pp. 874-785). Second, *Fox* does not preclude the application of *Riley* in this case. (See maj. opn., *ante*, at pp. 29-30.) It *is* "impossible for Nike to address" certain public issues without addressing its own labor practices (maj. opn., *ante*, at p. 30), because these practices are the public issue and symbolize the current

Although the United States Supreme Court has mostly found this intertwining of commercial and noncommercial speech in the charitable solicitation context,[4] it has also done so in a factual context analogous to the one presented here. In *Thomas v. Collins*, *supra*, 323 U.S. 516,[5] the United States Supreme Court held that a speech made by a union representative promoting the union's services and inviting workers to join constituted noncommercial speech fully protected by the First Amendment. (*Id.* at pp. 536-537.) Although the court acknowledged that the speech promoted the services of the union and sought to solicit new members, it found that these commercial elements were inextricably intertwined with the noncommercial elements addressing a public issue—unionism. (See *id.* at pp. 535-536.) "The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest at-

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debate over overseas labor exploitation and economic globalization (see, *post*, at pp. 17-20).

[4] (See, e.g., *Riley*, *supra*, 487 U.S. at p. 796; *Secretary of State of Md. v. J. H. Munson Co.* (1984) 467 U.S. 947, 959-960; *Village of Schaumburg v. Citizens for Better Environ.* (1980) 444 U.S. 620, 632; see also *Meyer v. Grant* (1988) 486 U.S. 414, 422, fn. 5 [finding the solicitation of signatures for a petition to be noncommercial speech].)

[5] The majority contends *Thomas* and *Thornhill* are not relevant because "[t]he United States Supreme Court issued these decisions three decades before it developed the modern commercial speech doctrine in *Bigelow v. Virginia* [(1975)] 421 U.S. 809, and *Va.* [*Consumer Council*], *supra*, 425 U.S. 748." (Maj. opn., *ante*, at p. 27.) The majority, however, conveniently neglects to mention that both *Bigelow* and *Va. Consumer Council* cite *Thomas* and *Thornhill* with approval. (See *Va. Consumer Council*, *supra*, 425 U.S. at pp. 758-759 [citing *Thomas* as a case where the court "has stressed that communications to which First Amendment protection was given were not 'purely commercial' "]; *id.* at pp. 757, 762; *Bigelow*, *supra*, 421 U.S. at p. 816.) Thus, the United States Supreme Court, in developing the commercial speech doctrine, did not intend to overrule or diminish the relevance of *Thomas* and *Thornhill*. In any event, the binding effect of a high court opinion does not diminish with age.

tachment to the union by becoming a member." (*Id.* at p. 535.) Indeed, "whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation." (*Ibid.*)

Finding that the commercial elements of the union representative's speech should be accorded the full protection of the First Amendment, the court concluded that distinguishing between the speech's commercial and noncommercial elements "offers no security for free discussion." (*Thomas v. Collins*, *supra*, 323 U.S. at p. 535.) "In these conditions," making such a distinction "blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim." (*Ibid.*) "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. A restriction so destructive of the right of public discussion . . . is incompatible with the freedoms secured by the First Amendment." (*Id.* at pp. 536-537.)

This case presents a similar scenario because Nike's overseas labor practices have become a public issue. According to the complaint, Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike's labor practices.[6] Given these facts, Nike's

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[6] (See, e.g., Cleeland, Market Savvy Students Give Sweatshop Fight the College Try, L.A. Times (Apr. 22, 1999) p. C1 ["a half-dozen universities have adopted stringent codes of conduct for manufacturers of apparel that bear their logos; many more are reexamining their policies"]; Martinez, Student Protests Unlikely to Kill UA-Nike Deal, Ariz. Daily Star (Jan. 25, 1998) p. 1B ["Hundreds of UA students have signed a petition protesting the university's impending con-

overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection." (*Connick v. Myers*, *supra*, 461 U.S. at p. 145.) Because Nike could not comment on this public issue *without* discussing its overseas labor practices, the commercial elements of Nike's representations about its labor practices were inextricably intertwined with their noncommercial elements. (See *Riley*, *supra*, 487 U.S. at p. 796.) As such, these representations must be fully protected as noncommercial speech in the factual context presented here. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 535-536.)

The majority's assertion that Nike's representations about its overseas labor practices are distinct from its comments on "policy questions" is simply wrong. (Maj. opn., *ante*, at p. 28.) The majority contends Nike can still comment on the policy issues implicated by its press releases and letters because it can generally discuss "the degree to which domestic companies should be responsible for working conditions in factories located in other countries, or what standards domestic companies ought to observe in such factories, or the merits and effects of economic 'globalization' generally . . . ." (Maj. opn, *ante*, at pp. 28-29.) The majority, however, conveniently forgets that Nike's over-

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tract with Nike because of alleged human rights abuses in the company's factories overseas"]; Stepping Up Nike Criticism, Newsday (Nov. 10, 1997) p. A22 ["More than 50 lawmakers yesterday called on Nike Inc. to improve labor standards in Third World factories and to employ more people in the United States"]; Stancill, Students to Keep Pressure on Nike, Raleigh News & Observer (Nov. 8, 1997) p. B1 [students signing and circulating petitions against Nike]; Jeffcott, Consumer Power Takes on Brand Names, Big Retailers (Sept. 7, 1997) 21 Catholic New Times 14, 15 [as part of the global movement to end sweatshops, various groups are pressuring "city councils to adopt 'no sweat resolutions' " directed at multinational companies like Nike]; Himelstein, Going Beyond City Limits?, Business Week (July 7, 1997) p. 98 [at least 10 cities have passed no-sweatshop ordinances directed at multinational companies like Nike]; Klein, Just Doing It Lands Nike in Ethical Hot Water, Toronto Star (Feb. 24, 1997) p. A19 [city council passes resolution banning the use of child-made Nike soccer balls].)

seas labor practices *are* the public issue. (See, *ante*, at pp. 17-18.) Thus, general statements about overseas labor exploitation and economic globalization do not provide Nike with a meaningful way to participate in the public debate over *its* overseas labor practices. (See *Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537.)

Even if the majority correctly characterizes the public issues implicated by Nike's press releases and letters, its assertion is still wrong. In light of the sophisticated media campaign directed at Nike's overseas labor practices and the close association between Nike's labor practices and the public debate over overseas labor exploitation and economic globalization, Nike could not comment on these public issues without discussing its own labor practices. Indeed, Nike could hardly condemn exploitation of overseas workers and discuss the virtues of economic globalization without implying that it helps overseas workers and does not exploit them. By limiting Nike to "innocuous and abstract discussion," the majority has effectively destroyed Nike's "right of public discussion." (*Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537.) Under these circumstances, Nike no longer "has the full panoply of protections available to its direct comments on public issues . . . ." (*Bolger*, *supra*, 463 U.S. at p. 68, fn. omitted.) Accordingly, the factual representations in Nike's press releases and letters are fully protected under current First Amendment jurisprudence. (See *Thomas v. Collins*, at pp. 536-537; *Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Such a conclusion is consistent with the commercial speech decisions of the United States Supreme Court. Most of these decisions involve core commercial speech that does "no more than propose a commercial transaction."[7] (*Pittsburgh Press*,

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[7] (See, e.g., *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 536 [oral, written, graphic, or pictorial advertisements for smokeless tobacco and cigars]; *Greater New Orleans Broadcasting*, *supra*, 527 U.S. at p. 176 [radio broadcasts of promotional ads for casino gambling]; *44 Liquormart, Inc. v. Rhode Island*, *supra*, 517 U.S. at pp. 492-493 (plur. opn. of Steven, J.) [ads referencing the price of alcohol products]; *Rubin v. Coors Brewing Co.* (1995) 514 U.S. 476, 481 [par-

supra, 413 U.S. at p. 385.) Because speech that just proposes a commercial transaction, by definition, only promotes the sale of a product or service and does not address a public issue, these decisions are inapposite.

The United States Supreme Court decisions finding hybrid speech containing both commercial and noncommercial elements to be commercial are also distinguishable. In these cases, the court found that the commercial elements of the speech were separable from its noncommercial elements and were therefore unnecessary for conveying the noncommercial message. (See *Fox*, *supra*, 492 U.S. at p. 474 [sales pitch for Tupperware was not an indispensable part of the noncommercial speech about home economics]; *Zauderer v. Office of Disciplinary Council* (1985) 471 U.S. 626, 637, fn. 7 [client solicitations were separable from noncommercial statements describing legal rights].) Because the commercial message was merely linked to—and not inextricably intertwined with—the noncommercial message, the court concluded that restrictions on the commercial message would not stifle the speaker's ability to engage in protected

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ties conceded that labels on alcohol products listing alcohol content was commercial speech]; *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 138 [ads and promotional communications listing professional affiliations of attorney]; *United States v. Edge Broadcasting Co.* (1993) 509 U.S. 418, 421 [radio broadcasts advertising lotteries]; *Edenfield v. Fane*, *supra*, 507 U.S. at pp. 763-764 [in-person solicitations for business by certified public accountants]; *Discovery Network*, *supra*, 507 U.S. at pp. 416, 424 [parties conceded that magazines were commercial speech]; *Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 330 [casino ads]; *In re R.M.J.* (1982) 455 U.S. 191, 196-197 [print ads and professional announcement cards]; *Central Hudson*, *supra*, 447 U.S. at p. 562, fn. 5 [ads "clearly intended to promote sales"]; *Friedman v. Rogers* (1979) 440 U.S. 1, 11 [trade name]; *Ohralik*, *supra*, 436 U.S. at p. 454 [in-person solicitation of business by lawyer]; *Bates*, *supra*, 433 U.S. at p. 354 [ads containing pricing information]; *Va. Consumer Council*, *supra*, 425 U.S. at pp. 760-761 [ads containing drug prices]; *Pittsburgh Press Co. v. Human Relations Comm'n* (1973) 413 U.S. 376, 379 [job ads].)

speech. As explained above, this case is different. Nike's overseas business operations have become the public issue, and Nike cannot comment on important public issues like overseas worker exploitation and economic globalization without implicating its own labor practices. (See, *ante*, at pp. 17-20.) Thus, the commercial elements of Nike's press releases, letters, and other documents were inextricably intertwined with their noncommercial elements, and they must be fully protected as noncommercial speech. (See *Riley*, *supra*, 487 U.S. at p. 796; *Thomas v. Collins*, *supra*, 323 U.S. at pp. 536-537; *Gordon & Breach*, *supra*, 859 F.Supp. at p. 1544.)

Finally, *Bolger*, the primary case relied on by the majority, is distinguishable. In *Bolger*, a contraceptive manufacturer wished to mail, among other things, informational pamphlets that discussed the problem of venereal disease and the benefits of condoms and referenced the manufacturer. The United States Postal Service banned the mailings, and the manufacturer challenged the constitutionality of the ban. (See *Bolger*, *supra*, 463 U.S. at pp. 62-63.) In assessing the constitutionality of the ban, the United States Supreme Court concluded that the informational pamphlets constituted commercial speech "notwithstanding the fact that they contain discussions of important public issues." (*Id.* at pp. 67-68, fn. omitted.) Unlike Nike's overseas business operations, however, the products at issue in *Bolger* had not become a public issue. Moreover, in the factual context of *Bolger*, the manufacturer could have commented on the issues of venereal disease and family planning through avenues other than promotional mailings and without referencing its own products. By contrast, Nike has *no* other avenue for defending its labor practices, given the breadth of sections 17204 and 17535 (see maj. opn., *ante*, at pp. 7-8), and Nike cannot comment on the issues of labor exploitation and economic globalization without referencing its own labor practices (see, *ante*, at pp. 19-20). Given these differences, *Bolger* does not compel the majority's conclusion.

Constrained by the United States Supreme Court's current formulation of the commercial speech doctrine, I would therefore conclude that Nike's press releases, letters, and other docu-

ments defending its overseas labor practices are noncommercial speech. Based on this conclusion, I would find the application of sections 17204 and 17535 to Nike's speech unconstitutional. Accordingly, I would affirm the judgment of the Court of Appeal.

V

The majority attempts to refute the application of the inextricably intertwining doctrine by factually distinguishing *Thomas* and *Thornhill*. The majority's proposed distinction, however, exposes a major flaw in its analysis. According to the majority, *Thomas* and *Thornhill* do not control because they neither address "the validity of a law prohibiting false or misleading speech" (maj. opn., *ante*, at p. 27) nor bar states from prohibiting "false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations" (*id.* at p. 28). The majority apparently finds this distinction persuasive because it previously concluded that Nike's speech is only "commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." (*Id.* at p. 26.)

Although the logic is difficult to follow, the majority apparently characterizes corporate speech as commercial or noncommercial based on whether the speech is false or misleading. Such an outcome, however, betrays a fundamental misunderstanding of the issue presented in this case. As the majority acknowledges, state laws may only prohibit false or misleading speech if that speech is commercial. Thus, the critical question is whether the speech at issue is commercial or noncommercial speech. Whether the statutes at issue are "designed to prevent false advertising and other forms of commercial deception" has no bearing on this question. (Maj. opn., *ante*, at p. 26.) The majority's assertion that Nike's statements are commercial speech because the application of false advertising laws is at issue therefore makes no sense. (See *ibid.*) Indeed, the majority begs the question by making false or misleading corporate speech commercial speech because it is false or misleading.

VI

In today's world, the difference between commercial and noncommercial speech is not black and white. Due to the growing politicization of commercial matters and the increased sophistication of advertising campaigns, the intersection between commercial and noncommercial speech has become larger and larger. As this gray area expands, continued adherence to the dichotomous, all-or-nothing approach developed by the United States Supreme Court will eventually lead us down one of two unappealing paths: either the voices of businesses in the public debate will be effectively silenced, or businesses will be able to dupe consumers with impunity.

Rather than continue down this path, I believe the high court must reassess the commercial speech doctrine and develop a more nuanced inquiry that accounts for the realities of today's commercial world. Without abandoning the categories of commercial and noncommercial speech, the court could develop an approach better suited to today's world by recognizing that not all speech containing commercial elements should be equal in the eyes of the First Amendment.

For example, the United States Supreme Court could develop an intermediate category of protected speech where commercial and noncommercial elements are closely intertwined. In light of the conflicting constitutional principles at play, this intermediate category could receive greater protection than commercial speech but less protection than noncommercial speech. Under such an approach, false or misleading speech that falls within the intermediate category could be actionable so long as states do not impose liability without fault. (Cf. *Gertz*, *supra*, 418 U.S. at p. 347 ["so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"].)

Alternatively, the court could abandon its blanket rule permitting the proscription of all false or misleading commercial speech. Instead, the court could devise a test for determining whether governmental restrictions on false or misleading speech

with commercial elements survive constitutional scrutiny. In doing so, the court could develop a more nuanced approach that maximizes the ability of businesses to participate in the public debate without allowing consumer fraud to run rampant.

Even if these suggestions are unworkable or problematic, the practical realities of today's commercial world require a new " 'accommodation between [First Amendment] concern[s] and the limited state interest present in the context of' " strict liability actions targeting speech with inextricably intertwined commercial and noncommercial elements. (*Dun & Bradstreet*, *supra*, 472 U.S. at p. 756 (plur. opn. of Powell, J.), quoting *Gertz*, *supra*, 418 U.S. at p. 343.) The high court long ago recognized that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." (*Bigelow v. Virginia*, *supra*, 421 U.S. at p. 826.) Given the growing intersection between advertising and noncommercial speech, such as political, literary, scientific and artistic expression, this observation is equally cogent where the commercial speech is false or misleading.

I realize the task is not easy. Indeed, Justice Scalia has recently alluded to the intractability of the problem. (See *44 Liquormart v. Rhode Island*, *supra*, 517 U.S. 484, 518 (conc. opn. of Scalia, J.) ["I do not believe we have before us the wherewithal to declare *Central Hudson* wrong—or at least the wherewithal to say what ought to replace it"].) Nonetheless, a new accommodation of the relevant constitutional concerns is possible, and the United States Supreme Court can and should devise a more nuanced approach that guarantees the ability of speakers engaged in commerce to participate in the public debate without giving these speakers free rein to lie and cheat.

For example, such an accommodation could permit states to bar *all* false or misleading representations about the characteristics of a product or service—i.e., the efficacy, quality, value, or safety of the product or service—without justification even if these characteristics have become a public issue. In such a situation, the governmental interest in protecting consumers from fraud is especially strong because these representations address the fundamental questions asked by every consumer

when he or she makes a buying decision: does the product or service work well and reliably, is the product or service harmful and is the product or service worth the cost? Moreover, these representations are the traditional target of false advertising laws. Thus, the strong governmental interest in this context trumps any First Amendment concerns presented by a blanket prohibition on such false or misleading representations.

By contrast, the governmental interest in protecting against consumer fraud is less strong if the representations are unrelated to the characteristics of the product or service. In some situations involving these representations, the First Amendment concerns *may* trump this governmental interest. A blanket prohibition of false or misleading representations in such a situation would be unconstitutional because the prohibition may stifle the ability of businesses to comment on public issues. Indeed, this case offers a prime example. Making Nike strictly liable for any false or misleading representations about its labor practices stifles Nike's ability to participate in a public debate *initiated by others*. Accommodating the competing interests in this context precludes the blanket prohibition favored by the majority. Although strict liability is inappropriate, an actual malice standard may be too high because these representations undoubtedly influence some consumers in their buying decisions, and the government has a strong interest in minimizing consumer deception. Thus, a well-crafted test could give states the flexibility to define the standard of liability for false or misleading misrepresentations in this context so long as the standard is not strict liability.[8] (Cf. *Gertz*, *supra*, 418 U.S. at p. 347.)

VII

The majority accuses me of searching for my own "magic formula or incantation" because I urge a reevaluation of the commercial speech doctrine. (Maj. opn, *ante*, at p. 33.) To this

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[8] States may, however, adopt a strict liability standard for false and misleading representations unrelated to the characteristics of a product or service where the representations are not inextricably tied to a public issue.

charge, I plead guilty. Unlike the majority who finds nothing unsettling about doctrinal incoherence, I readily acknowledge that some wizardry may be necessary if courts are to adapt the commercial speech doctrine to the realities of today's commercial world. Unfortunately, Merlin and Gandalf are busy, so the United States Supreme Court will have to fill the gap.

Although I make these magical references in jest, my point is serious: the commercial speech doctrine needs and deserves reconsideration and this is as good a place as any to begin. I urge the high court to do so here.

BROWN, J.

MARC KASKY,
Plaintiff and Appellant,
v.
NIKE, INC., et al.
Defendants and Respondents.

No. S087859

CALIFORNIA SUPREME COURT

May 2, 2002, Decided

MODIFICATION OF OPINION

THE COURT:

The majority opinion in this matter is modified as follows:

In the second full paragraph on page 7 of the opinion, the last sentence and accompanying citation are amended to read: "An order for restitution is one 'compelling a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken.' (*Kraus v. Trinity Management Services, Inc., supra,* 23 Cal.4th at pp. 126-127.)"

This modification does not affect the judgment.

MARC KASKY,
Plaintiff and Appellant,
v.
NIKE, INC., et al.
Defendants and Respondents.

No. A086142

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT
DIVISION ONE

March 20, 2000, Decided

In this private attorney general action against Nike, Inc., and five of its corporate officers, the nominal plaintiff appeals from a judgment of dismissal entered on an order sustaining the defendants' demurrer on First Amendment grounds. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nike, Inc., a marketer of athletic shoes and sports apparel, has grown into a large multinational enterprise through a marketing strategy centering on a favorable brand image, which is associated with a distinctive logo and the advertising slogan, "Just do it." To maintain this image, the company invests heavily in advertising and brand promotion, spending no less than $978,251,000 for the year ending May 31, 1997. The promotional activities include product sponsorship agreements with celebrity athletes, professional athletic teams, and numerous college athletic teams. Reviewing the company's successful marketing strategy, the 1997 annual report asserts, "[W]e are a company . . . that is based on a brand, one with a genuine and distinct personality, and tangible, emotional connections to consumers the world over . . . ."

Like other major marketers of athletic shoes and sports apparel, Nike contracts for the manufacture of its products in countries with low labor costs. In Nike's case, the actual production facilities are owned by South Korean and Taiwanese companies that manufacture the products under contract with Nike. The bulk of Nike products are manufactured in China, Thailand, and Indonesia, though some components or products involving more complex technology are manufactured in South Korea or Taiwan. In 1995, a Korean company opened up a major new facility in Vietnam, giving that country also a significant share of Nike's production. The record indicates that between 300,000 and 500,000 workers are employed in Asian factories producing Nike products. The complaint alleges that the vast majority of these workers are women under the age of 24.

The company has sought to foster the appearance and reality of good working conditions in the Asian factories producing its products. All contractors are required to sign a Memorandum of Understanding that, in general, commits them to comply with local laws regarding minimum wage, overtime, child labor, holidays and vacations, insurance benefits, working conditions, and other similar matters and to maintain records documenting their compliance. To assure compliance, the company conducts spot audits of labor and environmental conditions by accounting firms. Early in 1997, Nike retained a consulting firm, co-chaired by Andrew Young, the former ambassador to the United Nations, to carry out an independent evaluation of the labor practices in Nike factories. After visits to 12 factories, Young issued a report that commented favorably on working conditions in the factories and found no evidence of widespread abuse or mistreatment of workers.

Nevertheless, Nike was beset in 1996 and 1997 with a series of reports on working conditions in its factories that contrasted sharply with the favorable view in the Young report. An accounting firm's spot audit of the large Vietnamese factory, which was leaked to the press by a disgruntled employee, reported widespread violations of local regulations and atmos-

pheric pollution causing respiratory problems in 77 percent of the workers. An investigator for Vietnam Labor Watch found evidence of widespread abuses and a pervasive "sense of desperation" from 35 interviews with Vietnamese workers. An Australian organization published a highly critical case study on Nike's Indonesian factories. And the Hong Kong Christian Industrial Committee released an extensively documented study of several Chinese factories, including three used by Nike, which reported 11- to 12-hour work days, compulsory overtime, violation of minimum wage laws, exposure to dangerous levels of dust and toxic fumes, and employment of workers under the age of 16.

These reports put Nike under an unusual degree of public scrutiny as a company exemplifying a perceived social evil associated with economic globalization–the exploitation of young female workers in poor countries. An article in The Oregonian of Portland, Oregon, asserted: "The company's worldwide production system has turned the Beaverton giant into an international human rights incident." The News & Record of Greensboro, North Carolina, asked, "But who wants to enjoy products made on the backs of human misery?" The New York Times carried a series of eight articles in 1996 and 1997, reporting "grim conditions" and widespread human rights abuses in Nike factories. And a CBS television report juxtaposed the complaints of a Vietnamese worker with disclaimers by company officials.

Nike countered with a public relations campaign that defended the benefits of its Asian factories to host countries and sought to portray the company as being in the vanguard of responsible corporations seeking to maintain adequate labor standards in overseas facilities. Press releases responded to sweatshop allegations, addressed women's issues, stressed the company's code of conduct, and broadly denied exploitation of underage workers. A more lengthy press release, entitled "Nike Production Primer" answered a series of allegations with detailed information and footnoted sources. Another release drew attention to the favorable Young report and invited readers to consult it on-line. A letter to the presidents and athletic directors

of those colleges sponsoring Nike products defended the company's labor practices. And company officials sought to rebut specific charges in letters to the editor and to nonprofit organizations.

The complaint alleges that, in the course of this public relations campaign, Nike made a series of six misrepresentations regarding its labor practices: (1) "that workers who make NIKE products are . . . not subjected to corporal punishment and/or sexual abuse;" (2) "that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours;" (3) "that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions;" (4) "that NIKE pays average line-workers double-the-minimum wage in Southeast Asia;" (5) "that workers who produce NIKE products receive free meals and health care;" and (6) "that NIKE guarantees a 'living wage' for all workers who make NIKE products." In addition, the complaint alleges that NIKE made the false claim that the Young report proves that it "is doing a good job and 'operating morally.' "

The first and second causes of action, based on negligent misrepresentation and intentional or reckless misrepresentation, alleged that Nike engaged in an unlawful business practice in violation of Business and Professions Code section 17200 by making the above misrepresentations "In order to maintain and/or increase its sales and profits . . . through its advertising, promotional campaigns, public statements and marketing . . . ." The third cause of action alleged unfair business practices within the meaning of section 17200, and the fourth cause of action alleged false advertising in violation of Business and Professions Code section 17500. The prayer sought an injunction ordering Nike "to disgorge all monies" that it acquired by the alleged unlawful and unfair practices, "to undertake a Court-approved public information campaign" to remedy the misinformation disseminated by its false advertising and unlawful and unfair practices, and to cease "[m]isrepresenting the working conditions under which NIKE products are made . . . ."

Nike and the individual defendants filed demurrers to the complaint challenging the application of Business and Profes-

sions Code sections 17200 and 17500 and contending that the complaint is barred by the First Amendment to the United States Constitution and article I, section 2(a), of the California Constitution. The trial court regarded the constitutional distinction between commercial and noncommercial speech to be dispositive. Following a hearing, the court sustained the demurrers without leave to amend and entered a judgment of dismissal from which the plaintiff appeals.

DISCUSSION

Like the trial court, we chose to analyze the important constitutional issues raised by the action and express no opinion as to the multiple objections raised by Nike regarding the application of Business and Professions Code section 17200 to the facts of the case.

"On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, appellate courts assume the truth of all facts properly pleaded by the plaintiff-appellant." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1999) par. 8:136, p. 8-65; *Day v. AT & T Corp.* (1998) 63 Cal.App.4th 325, 331.) Hence, we are obliged to assume that Nike in fact misrepresented facts regarding the labor practices in its Asian factories to induce consumers to buy its products. Plaintiff relies chiefly on the theory that these alleged misrepresentations fall within the category of commercial speech for which Nike can be held accountable under accepted constitutional principles.

Since extending First Amendment protection to commercial speech in *Bigelow v. Virginia* (1975) 421 U.S. 809 and *Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, the United States Supreme Court has "been careful to distinguish commercial speech from speech at the First Amendment's core. ' "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." ' " (*Florida Bar v. Went for It, Inc.* (1995) 515 U.S.

618, 623, citing *Board of Trustees of State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 477.)[1]

A line of decisions extending from *Va. Pharmacy Bd.* has sanctioned restraints on commercial speech that is false, deceptive or misleading. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at pp. 770-771.) As stated in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 383, "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint. [Citation.] Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. [Citation.] . . . [T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." (See also *Ibanez v. Florida Dept of Business and Professional Regulation, Bd. of Accountancy* (1994) 512 U.S. 136, 142; *Edenfield v. Fane* (1993) 507 U.S. 761, 768; *People v. Morse* (1993) 21 Cal.App.4th 259, 265;

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[1] It has long been recognized that the First Amendment of the United States Constitution applies to the states under the due process clause of the Fourteenth Amendment. (*44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 489, fn. 1.) In certain contexts, article I, section 2, of the California Constitution offers a " 'more definitive and inclusive . . .' " protection of free speech than the First Amendment of the United States Constitution (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 519, citation omitted; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908). But we see no basis for distinguishing between the federal and state Constitutions with respect to the issues here on appeal and will refer to both Constitutions by use of the term "First Amendment." In declining to differentiate between the state and federal Constitutions, we find support in *People v. Superior Court (Olson)* 96 Cal.App.3d 181 [equating the protection of commercial speech under the California and federal Constitutions] and *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711 [applying same standard of liability for defamation under both Constitutions]. (See also *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 555, fn. 1.)

People v. Superior Court (Olson), supra, 96 Cal.App.3d at p. 191.)

To distinguish between commercial and noncommercial speech, we begin with the leading United States Supreme Court decision, *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60. There, a condom manufacturer faced prosecution for unsolicited mailings regarding its product. Most of the mailings consisted of advertisements conveying price and quantity information about the plaintiff's brand, which, the court held, fell "within the core notion of commercial speech—'speech which does "no more than propose a commercial transaction." ' [Citation.]" (*Id.* at p. 66, fn. omitted.) But the manufacturer also mailed two informational pamphlets about condom use, containing no more than references to its brand of condoms. Holding that these pamphlets were also commercial speech, the court considered a series of relevant characteristics: "The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. [Citation.] Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. [Citation.] Finally, the fact that [plaintiff] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. [Citations.] [¶] The combination of *all* these characteristics, however, provides strong support for the District Court's conclusion that the informational pamphlets are properly characterized as commercial speech." (*Id.* at pp. 66-67, fns. omitted.)[2]

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[2] The decisional law offers an array of verbal formulations to distinguish commercial and noncommercial speech. *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557, 561, broadly describes commercial speech as "expression related solely to the economic interests of the speaker and its audience." (See also *In re R. M. J.* (1982) 455 U.S. 191, 204, fn. 17.) Other decisions refer to a narrower characterization of commercial speech found in *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 762 – "speech which does 'no more than propose a commercial transaction . . . .' " (E.g., *Board of Trustees, State Univ. of N. Y. v. Fox* (1989) 492 U.S. 469, 473; *Posadas de Puerto Rico Assoc. v. Tourism Co.* (1986) 478 U.S. 328, 340.) In *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal. 3d at p. 511, our high court sought to bridge the gap between this differing language with a somewhat more flexible formulation: "commercial speech is that which has but one purpose to advance an economic transaction." (See conc. opn. of Stevens, J. in *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* at pp. 579-580.)

We find our way out of this complexity by relying on the *Bolger* decision. Our reliance on *Bolger* follows federal decisions in *Association of Nat. Advertisers, Inc. v. Lungren* (9th Cir. 1994) 44 F.3d 726, 728, and *Semco, Inc. v. Amcast, Inc.* (6th Cir. 1995) 52 F.3d 108, 112-113, and the recent decision in *Keimer v. Buena Vista Books, Inc.* (1999) 75 Cal.App.4th 1220, 1228-1229, and appears to be mandated by *Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, which also discusses *Bolger* as the most pertinent and authoritative precedent dealing with the distinction between commercial and noncommercial speech. In our view, the general discussion of commercial and noncommercial speech in *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal.3d 501 is consistent with the more precise guidelines in the *Bolger* decision.

[3] Repealed. (Stats. 1995, ch. 642, § 2, p. 92.)

The *Bolger* distinction was applied by the Ninth Circuit in *Association of Nat. Advertisers, Inc. v. Lungren, supra,* 44 F.3d 726, to representations, like those at issue here, that appealed to the consumer's sense of social responsibility. Former California Business and Professions Code section 17508.5[3] prohibited a manufacturer or distributor of consumer goods from making a series of representations regarding the environmental impact of the goods, such as that they were "ozone friendly" or "biodegradable," unless the goods met certain statutory definitions of these terms. Though falling outside the "core notion" of commercial speech, the court concluded that these environmental representations constituted commercial speech as defined by the three characteristics recognized in the *Bolger* decision. An earlier decision, on which appellant relies, concerned representations about the effects of a product on health. In *National Com'n on Egg Nutrition v. F. T. C.* (7th Cir. 1977) 570 F.2d 157, the court reviewed a Federal Trade Commission order di-

recting a trade association to desist from disseminating advertisements to the effect that "there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease." (*Id.* at p. 158, fn. omitted.) The court held that the advertisements fell within the category of " 'deceptive or misleading' commercial speech," subject to restraint under the First Amendment. (*Id.* at p. 162, citation omitted.)

Though the *Bolger, Egg Nutrition,* and *Association of National Advertisers* decisions present certain points of similarity to the present case, they differ in one fundamental respect: they concern communications conveying information or representations about specific characteristics of goods. In contrast, the speech at issue here was intended to promote a favorable corporate image of the company so as to induce consumers to buy its products. A Nike executive expressed this business objective in a letter to the editor: "Consumers . . . want to know they support companies with good products and practices. . . . During the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions."

The fact that the communications at issue here served to promote a favorable corporate image through press releases and letters takes them outside two of the three characteristics of commercial speech noted in the *Bolger* decision—advertising format and reference to specific product. We recognize that false press releases may support claims for damages or injunctive relief (*S.E.C. v. Rana Research, Inc.* (9th Cir. 1993) 8 F.3d 1358; *Southwell v. Mallery, Stern & Warford* (1987) 194 Cal.App.3d 140, 142-143; cf., *Semco, Inc. v. Amcast, Inc., supra,* 52 F.3d at pp. 112-113), and we are mindful that the *Bolger* court did not "mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial." (*Bolger v. Youngs Drug Products Corp., supra,* 463 U.S. at p. 67, fn. 14.) But we think that a public relations campaign focusing on corporate image, such as that at issue here, calls for a different analysis than that applying to product advertisement.

The question of possible rights to be accorded to advertising or public relations devoted to enhancement of a corporate image

may revolve around issues of property rights, rather than First Amendment protections, where the speech lacks "intrinsic meaning" or public interest. (*Friedman v. Rogers* (1979) 440 U.S. 1, 12; see also *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 580 (conc. opn. of Stevens, J.).) But the case at bar lies in familiar First Amendment territory – public dialogue on a matter of public concern. Though drafted in terms of commercial speech, the complaint in fact seeks judicial intervention in a public debate.

The "heart of the First Amendment's protection" lies in " 'the liberty to discuss publicly and truthfully all matters of public concern . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' " (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 776, quoting *Thornhill v. Alabama* (1940) 310 U.S. 88, 101-102.) In crafting this much quoted language,[4] the *Thornhill* court noted that the "exigencies" of the colonial period which gave birth to the First Amendment, centered around freedom from oppressive administration of government, but, in the industrial society of 1940, the same constitutionally protected "area of free discussion" embraced the dissemination of information about labor disputes. (*Thornhill v. Alabama, supra,* at p. 102; see also *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at pp. 762-763, fn. 17; *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal.3d at p. 511.) By the same logic, the labor practices of foreign contractors of domestic companies come within the "exigencies" of our times.

Nike exemplifies the perceived evils or benefits of labor practices associated with the processes of economic globalization. Though participants in purely private labor disputes are

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[4] See e.g., *Time, Inc. v. Hill* (1966) 385 U.S. 374, 388; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at page 776; *Bolger v. Youngs Drug Products Corp., supra,* 463 U.S. at page 68, footnote 15.

entitled to certain First Amendment protections,[5] Nike's strong corporate image and widespread consumer market places its labor practices in the context of a broader debate about the social implications of employing low-cost foreign labor for manufacturing functions once performed by domestic workers. We take judicial notice that this debate has given rise to urgent calls for action ranging from international labor standards to consumer boycotts. Information about the labor practices at Nike's overseas plants thus constitutes data relevant to a controversy of great public interest in our times.

Freedom of " 'expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." ' [Citations.]" (*FCC v. League of Women Voters of California* (1984) 468 U.S. 364, 381.) As stated in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' [Citation.]" (*Id.* at p. 269.) And, it represents a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." (*Id.* at p. 270.)

It follows that "under the free speech guaranty the validity and truth of declarations in political disputes over issues of public interest must be resolved by the public and not by a judge." (*Leonardini v. Shell Oil Co., supra,* 216 Cal.App.3d at p. 579, fn. 10.) "In the context of . . . public debate on a matter of public interest, the truth of the statement is irrelevant." (*Id.* at p. 577; see also *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 659; *O'Connor v. Superior Court* (1986) 177 Cal.App.3d 1013, 1019.) In the famous words of Judge Learned Hand, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any

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[5] *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 617; Labor *Board v. Virginia Power Co.* (1941) 314 U.S. 469, 477; *A. F. of L. v. Swing* (1941) 312 U.S. 321, 325-326.)

kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (*United States v. Associated Press* (S.D. N.Y. 1943) 52 F.Supp. 362, 372; see also *New York Times Co. v. Sullivan, supra,* 376 U.S. at p. 270.)

By protecting the public's access to "diverse and antagonistic sources" (*Associated Press v. United States* (1945) 326 U.S. 1, 20), the First Amendment serves an "informational purpose" (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. at p. 782, fn. 18), guaranteeing "the public access to discussion, debate, and the dissemination of information and ideas." (*Id.* at p. 783, fn. omitted; see also *id.* at p. 777, fn. 12.) The citizen enjoys this right of access to the free flow of information and ideas both for purposes of political decisionmaking in a democracy—the traditional "core" of the First Amendment[6]—and for private decisions significant to the conduct of life.[7] In *Linmark Associates, Inc. v. Willingboro* (1977) 431 U.S. 85, the court struck down a local ordinance banning "for sale" signs in front of residences, which was intended to dampen home sales motivated by racial fears. The First Amendment, the court held, prohibits any attempt to regulate the information available for the important personal choice of purchasing or selling a home. "That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the

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[6] *Posadas de Puerto Rico Assoc. v. Tourism Co., supra,* 478 U.S. at page 340, footnote 7 ["such political dialogue is at the core of . . . the first amendment"]. (Citation and internal quotation marks omitted.)

[7] To the extent that the protection of corporate speech benefits the citizen's access to information, corporate rights under the First Amendment may be described as being derivative, i.e., based on the need to protect the public's right of access to information. (Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State* (1991) 79 Cal.L.Rev. 1229, 1233, 1245-1248.) The derivative nature of the corporate right to assert the protection of the First Amendment resolves the paradox of recognizing a right of free speech in an artificial entity "existing only in contemplation of law." (*Dartmouth College v. Woodward* (1819) 17 U.S. 517, 634, Marshall, J.)

most important decisions they have a right to make: where to live and raise their families." (*Id.* at p. 96.)

The press releases and letters at issue here cross the boundary between political and private decisionmaking. The citizen may want to translate personal discontent over Nike's labor practices into political action or may merely wish to refrain from purchasing its products manufactured by undesired labor practices, just as he or she may wish to buy products with a union identification. (See *Spiritual Psychic Science Church v. City of Azusa, supra,* 39 Cal.3d at p. 511 ["an advertisement informing the public that the cherries for sale at store X were picked by union workers . . . communicates a message beyond that related to the bare economic interests of the parties."].) In either case, "the First Amendment protects the public's interest in receiving information." (*Pacific Gas & Elec. Co. v. Public Util. Comm'n* (1986) 475 U.S. 1, 8.)

Finally, we note that "commercial motivation does not transform noncommercial speech into commercial speech . . . ." (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1048, fn. 3; see also *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 762; *Leonardini v. Shell Oil Co., supra,* 216 Cal.App.3d at p. 576, fn. 8; *O'Connor v. Superior Court, supra,* 177 Cal.App.3d at p. 1018.) The present case is not one in which commercial speech is linked to noncommercial speech (*Zauderer v. Office of Disciplinary Counsel* (1985) 471 U.S. 626, 637, fn. 7; *Bolger v. Youngs Drug Products Corp., supra,* 463 U.S. at p. 68; *Central Hudson Gas & Elec. v. Public Serv. Comm'n, supra,* 447 U.S. at p. 563, fn. 5), nor again one in which commercial and noncommercial speech are " 'inextricably intertwined.' " (*Board of Trustees, State Univ. of N. Y. v. Fox, supra,* 492 U.S. at p. 474, citation omitted.) Rather, the record discloses noncommercial speech, addressed to a topic of public interest and responding to public criticism of Nike's labor practices. The fact that Nike has an economic motivation in defending its corporate image from such criticism does not alter

the significance of the speech to the "listeners"[8] the consumers or other members of the public concerned with labor practices attending the process of economic globalization.

Our analysis of the press releases and letters as forming part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment compels the conclusion that the trial court properly sustained the defendants' demurrer without leave to amend. We see no merit to appellant's scattershot argument that he might still be able to state a cause of action on some theory allowing content-related abridgement of noncommercial speech. The United States Supreme Court allows content-based restrictions on noncommercial speech only if they come within very narrowly defined circumstances, such as libel, obscenity, fighting words (*Consolidated Edison Co. v. Public Serv. Comm'n* (1980) 447 U.S. 530, 538, fn. 5), or "survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." (*First National Bank of Boston v. Bellotti, supra,* 435 U.S. at p. 786.) The complaint does not allege facts coming within these narrow exceptions, and we see no reasonable possibility that it could be amended to do so. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

The judgment is affirmed. Costs are awarded to respondent.

SWAGER, J.

WE CONCUR:

STEIN, ACTING P.J.

MARCHIANO, J.

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[8] See *Linmark Associates, Inc. v. Willingboro, supra,* 431 U.S. at page 92, referring to prospective home buyers as "listeners," entitled to First Amendment protection.

MARC KASKY, on Behalf of the General Public of the State of California,

Plaintiff,

v.

NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER, STEPHEN GOMEZ, DAVID TAYLOR and DOES 1 through 200,

Defendants.

Case No. 994446

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

ORDER SUSTAINING DEMURRER BY DEFENDANTS NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER AND DAVID TAYLOR TO PLAINTIFFS' FIRST AMENDED COMPLAINT

The Demurrer of Defendants Nike, Inc., Philip Knight, Thomas Clarke, Mark Parker and David Taylor ("Defendants") to Plaintiff's First Amended Complaint came on regularly for hearing on January 7, 1999 at 9:30 a.m., in the Law and Motion Department of this Court. Robert P. Varian of Brobeck, Phleger & Harrison LLP appeared on behalf of Defendants. Paul R. Hoeber and Alan M. Caplan appeared on behalf of Plaintiff.

After full consideration of the authorities and arguments of counsel, and there being good cause therefor,

IT IS HEREBY ORDERED that Defendants Nike, Inc., Philip Knight, Thomas Clarke, Mark Parker and David Taylor's Demurrer to Plaintiff's First Amended Complaint IS SUSTAINED WITHOUT LEAVE TO AMEND.

The Honorable David A. Garcia
San Francisco County
Superior Court

DATED: 2/4/99

MARC KASKY, on Behalf of the General Public of the State of California,

Plaintiff,

v.

NIKE, INC., PHILIP KNIGHT, THOMAS CLARKE, MARK PARKER, STEPHEN GOMEZ, DAVID TAYLOR and DOES 1 through 200,

Defendants.

Case No. 994446

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

JUDGMENT DISMISSING COMPLAINT

The Court having sustained the Demurrer of Defendants Nike, Inc., Philip Knight, Thomas Clarke, Mark Parker and David Taylor ("Defendants") to Plaintiff's First Amended Complaint without leave to amend.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Code of Civil Procedure section 581(f)(1), Plaintiff's First Amended Complaint against Defendants is dismissed with prejudice.

The Honorable David A. Garcia
San Francisco County
Superior Court

DATED: 2/5/99

SUPREME COURT OF CALIFORNIA

MARC KASKY,
Plaintiff and Appellant,
v.
NIKE, INC., et al.
Defendants and Respondents.
No. S087859

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT DIVISION

JULY 31, 2002, Decided

Rehearing denied.

The request for modification of the opinion is denied.

Baxter, J., and Chin, J., are of the opinion the petition should be granted.

Brown, J., was absent and did not participate.

RELEVANT STATUTORY PROVISIONS

The California Business and Professions Code provides in relevant part:

17200. Definition.

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

17201. Person.

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

17202. Specific or preventive relief.

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

17203. Remedies and jurisdiction.

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

17204. Injunction prosecuted by Attorney General, district attorney, or city attorney.

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions in-

volving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

17205. Cumulative penalties.

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

17206. Civil penalty for violation of chapter.

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action. Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject

of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

17207. Violation of injunction.

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the

county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action. Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency. 17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

17500. False or misleading statements generally.

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is

known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

17506. "Person."

As used in this chapter, "person" includes any individual, partnership, firm, association, or corporation.

§ 17535. Injunction against violations; Restitution.

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

Supreme Court, U.S.
FILED
NOV 15
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

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November 14, 2002

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QUESTIONS PRESENTED

Acting only on behalf of the general public, respondent sued petitioner for making false statements in violation of state unfair-competition and false-advertising laws. The trial court sustained petitioner's demurrer to the first amended complaint on First Amendment grounds, but the state supreme court reversed and remanded for further proceedings. The questions presented are:

Jurisdictional

1. Whether respondent, who alleged no personal injury, has standing to sue under Article III; and, if not, whether petitioner, against whom no judgment has been entered, has Article III standing to seek review in this Court under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989).

2. Whether the decision below is a "final judgment" within the meaning of 28 U.S.C. § 1257(a).

Non-Jurisdictional

3. Whether the court below properly classified the statements at issue as commercial speech for purposes of laws regulating false advertising and other forms of commercial deception.

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OPINIONS BELOW

The opinion of the California Supreme Court is officially reported at 27 Cal.4th 939 (2002).

Contrary to Pet. 1, the opinion of the California Court of Appeal is unpublished. See 79 Cal.App.4th 179 (2000) ("Opinion (*Kasky v. Nike, Inc.*) on pages 165-178 omitted."). Under California law, the California Supreme Court's grant of review automatically vacated the Court of Appeal's opinion. *See* Cal. R. Ct. 976(d) ("[N]o opinion superseded by a grant of review . . . shall be published.") (Opp. App. 6a); *In re Marriage of Flaherty*, 31 Cal.3d 637, 641, 646 P.2d 179, 182 (1982) ("The grant of the petition for hearing . . . vacated the Court of Appeal opinion, and required this court to decide the appeal as if it were originally taken here.").

JURISDICTION

The Court has no jurisdiction in this case, because: (1) respondent lacks standing to sue under Article III, and petitioner Nike lacks Article III standing to seek review in this Court under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989); and (2) the California Supreme Court's decision overruling Nike's demurrer and remanding for further proceedings is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED

The following statutes and rules are printed in the appendix to this opposition: 15 U.S.C. § 1125(a); 28 U.S.C. § 1257(a); Cal. Bus. & Prof. Code §§ 17200, 17203, 17204, 17500, 17535, 17569; Cal. Civ. Pro. Code §§ 472, 472a(c), 472c(a); Cal. R. Ct. 325(e), 976(d).

STATEMENT OF THE CASE

1. Proceedings in the California Courts

Respondent Marc Kasky filed suit against petitioner Nike, Inc. in San Francisco Superior Court on April 20, 1998. He subsequently filed a first amended complaint as a matter of right. *See* Cal. Civ. Pro. Code § 472 (Opp. App. 5a). The first amended complaint is the operative pleading.

Respondent brought this action under California laws regulating unfair competition and false advertising. Cal. Bus. & Prof. Code § 17200 *et seq.* (unfair-competition law), § 17500 *et seq.* (false-advertising law); see Pet. App. 5a-7a. Under section 17200, "unfair competition" includes "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false-advertising law]." Opp. App. 2a. Under section 17500, it is unlawful to disseminate advertising "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." *Id.* 3a. The first amended complaint alleged that Nike violated these laws when, for the purpose of inducing consumers to buy its products, it made false statements of fact about the working conditions in the factories that manufacture its athletic shoes.

Respondent alleged "no harm or damages whatsoever regarding himself individually." First Amd. Cmplt. ¶ 8. Rather, he sued Nike "on behalf of the General Public of the State of California," *id.* ¶¶ 3, 8, as authorized by California's unfair-competition and false-advertising laws, which provide that private enforcement actions may be brought "by any person acting for the interests of . . . the general public," Cal. Bus. & Prof. Code §§ 17204, 17535 (Opp. App. 3a, 4a). In such an action, the available remedies are limited to restitution and injunctive relief and do not include damages. Cal. Bus. & Prof. Code §§ 17203, 17535 (Opp. App. 2a, 4a); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 179, 973 P.2d 527, 539 (1999). Respondent sought an injunction and restitution, which would be payable to others, not to himself. First Amd. Cmplt., Prayer for Relief.

Nike demurred to the first amended complaint on several grounds, including a defense based on the First Amendment. Deft. Nike, Inc.'s Demurrer ¶ 3. The superior court sustained Nike's demurrer and dismissed the case. Pet. App. 80a-81a. Respondent appealed rather than requesting leave to amend the first amended complaint. *See* Cal. Civ. Pro. Code § 472c(a) (Opp. App. 5a). The California Court of Appeal affirmed the dismissal. Pet. App. 66a. The California Supreme Court granted respondent's petition for review, an action that automatically vacated the Court of Appeal's opinion. See *supra* at 1.

The California Supreme Court reversed and remanded for further proceedings. Pet. App. 30a. The court noted that the case had come to it "after the superior court sustained defendants' demurrers to plaintiff's first amended complaint." *Id.* 2a. As required by California law, the court accepted the truth of the allegations of the first amended complaint "for the limited purposes of reviewing the superior court's ruling." *Id.* On the assumption that the allegations were true, the court held that because the statements by Nike at issue "were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products," the statements were "commercial speech for purposes of applying state laws barring false and misleading commercial messages." *Id.* 1a-2a. The court emphasized that "this lawsuit is still at a preliminary stage" and that the court had not decided whether the first amended complaint "is vulnerable to demurrer for reasons not considered here," observing that "[b]ecause the demurrers . . . were based on multiple grounds, further

proceedings on the demurrers may be required in the Court of Appeal, the superior court, or both." *Id.* 2a, 30a.

2. Allegations of the First Amended Complaint

The California Supreme Court's opinion accurately states the allegations of the first amended complaint. See Pet. App. 2a-4a. Because under California law a plaintiff's allegations must be taken as true on demurrer, *id.* 2a, the facts of this case are only the facts alleged in the first amended complaint.

The first amended complaint alleges that Nike is in the business of manufacturing, importing, distributing, and selling consumer goods in the form of athletic footwear and apparel. Almost all its athletic shoes are manufactured in its subcontractors' factories in China, Vietnam, and Indonesia. The majority of the workers in these factories are women under the age of 24. *Id.* 3a; First Amd. Cmplt. ¶¶ 18, 40.

Beginning in 1996, internal and external studies and reports, issued by Ernst & Young, Vietnam Labor Watch, and others, described the actual practices and working conditions in these factories. Among the facts revealed were that workers making Nike's athletic shoes were paid less than the applicable minimum wage; required to work overtime, often without pay, and encouraged to work more overtime than applicable laws allowed; subjected to verbal, physical, and sexual abuse; and exposed to reproductive toxins and other harmful chemicals, heat, dust, and noise without adequate safety equipment, in violation of local laws. Pet. App. 3a; First Amd. Cmplt. ¶¶ 18-20, 29, 32-33, 36-37, 40, 45, 48-50, 54, 59-60, 64, 73.

In response to the public disclosure of these factory conditions, Nike made the statements at issue in this case. "[F]or the purpose of maintaining and increasing its sales and profits," Nike made false factual statements to California consumers about the manufacturing practices and conditions under which its athletic shoes are made. In particular, Nike

falsely claimed that the factory workers "are paid in accordance with applicable local laws and regulations governing wages and hours" and "receive a 'living wage'" and "free meals and health care"; that the average line-workers are paid "double the applicable local minimum wage"; that the workers "are protected from physical and sexual abuse"; and that the "working conditions are in compliance with applicable local laws and regulations governing occupational health and safety." Pet. App. 3a; First Amd. Cmplt. ¶¶ 18, 25, 28-30, 32-37, 39-50, 52-53, 62-64.

These false factual statements appeared in various sorts of documents: a Nike pamphlet distributed to the media; Nike press releases, some posted on a Nike website on the Internet; Nike letters to organizations, including a letter that was mass-mailed from Nike's Sports Marketing Director to the presidents and directors of athletics of every major university in the country; and a Nike letter to the editor. Pet. App. 4a; First Amd. Cmplt. ¶¶ 18, 25, 28, 30, 39, 46, 52, 62. Besides containing the false statements at issue, these documents were devoted almost entirely to praising and promoting Nike and its manufacturing practices and were replete with references to the athletic shoes it was trying to sell.

In these documents, then, Nike made specific factual claims about the practices and conditions in the factories making its shoes. The first amended complaint alleges that these claims were false and that Nike's purpose in making them was to maintain and increase its sales and profits by appealing to consumers opposed to inhumane manufacturing practices. These consumers, for example, do not want to buy athletic shoes unless the working conditions of the people making them are, as Nike claimed, "in compliance with applicable local laws and regulations governing occupational health and safety." Pet. App. 3a; First Amd. Cmplt. ¶¶ 1, 27, 75, 79, 82. Thus, Nike made the false statements of fact at issue in this case for the commercial purpose of selling shoes.

For its own tactical reasons, Nike's petition presents a significantly different version of the facts, which Nike relies on as the basis for its legal contentions. According to Nike, the statements at issue concerned "issues of great political, social, and economic importance," Pet. QP 1 (also *id.* 3, 9, 10, 14, 15, 19, 23, 25, 29); and Nike was embroiled in a dispute over whether it is "an immoral company" or instead "an ethical company," *id.* 2, 10. But at the pleading stage of the case, Nike's version of the facts cannot replace the factual allegations of the first amended complaint. Those allegations, set forth above and accepted by the California Supreme Court, do not support Nike's version of the facts. Accordingly, Nike's version of the facts, and the legal contentions based on it, raise no issue for this Court.

REASONS FOR DENYING THE PETITION

I. The Court has no jurisdiction in this case, because neither party has standing under Article III.

Under California law, a plaintiff bringing an action for unfair competition and false advertising need not have traditional Article III standing. Because respondent does not allege the requisite personal injury in his state-court suit, this case would not have met Article III's "case-or-controversy" requirement had it been filed in federal court. For this Court to assert jurisdiction in a case where there was no "case or controversy" in state court, the petitioner must show, under *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623-24 (1989), that "the judgment of the state court causes direct, specific, and concrete injury" to the petitioner. Petitioner Nike cannot make this showing, and it therefore lacks Article III standing to seek review in this Court under *ASARCO*.

A. Because respondent alleges no personal injury, he lacks standing to sue under Article III.

California's unfair-competition and false-advertising laws authorized respondent to bring this action, and thus he has standing under state law. See *supra* at 2. But standing in this Court is "a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985).

Because respondent sues on behalf of the general public and alleges "no harm or damages whatsoever regarding himself individually," *supra* at 2, he does not meet Article III's "injury in fact" requirement, which requires "*personal injury*," *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks omitted). This has been the consistent ruling of the federal courts on claims by parties suing on behalf of the general public for violations of California's unfair-competition law. *See, e.g., Lee v. American Nat'l Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir. 2001) (no removal); *Sony Pictures Entertainment, Inc. v. Fireworks Entertainment Group, Inc.*, 156 F.Supp.2d 1148, 1167-68 (C.D. Cal 2001) (no counterclaim).

Nor is there any basis for finding the required personal injury in the relief sought. This case is unlike *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), where the *qui tam* relator was entitled to a share of the United States' damages recovery, and the Court explained that, "as to this portion of the recovery—the bounty he will receive if the suit is successful—a *qui tam* relator has a concrete private interest in the outcome of [the] suit." *Id.* at 772 (internal quotation marks omitted). Here, respondent neither sought nor was entitled to seek any damages or monetary award for himself. See *supra* at 2-3.

B. Because no judgment has been entered against petitioner Nike, it lacks Article III standing to seek review in this Court under *ASARCO, Inc. v. Kadish*.

ASARCO's standing requirement can be met only "if the judgment of the state court causes direct, specific, and concrete injury" to the petitioner. 490 U.S. at 623-24. This requirement is jurisdictional, and petitioner Nike, as the party invoking federal jurisdiction, "bears the burden of establishing its existence." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 104 (1998). Nike cannot avoid this burden by failing to mention the issue in its petition. Because no judgment of any kind has been entered against Nike in state court, Nike has suffered no "direct, specific, and concrete injury," and *ASARCO* does not allow review in this Court.

In *ASARCO*, the plaintiffs sued in state court to set aside leases of mineral rights in state land as void under federal law. The state supreme court held unconstitutional the state statute governing the leases and instructed the trial court to enter summary judgment for the plaintiffs, to enter a judgment declaring the statute invalid, and to consider whether further relief might be appropriate. 490 U.S. at 610. The defendants, mineral lessees who would lose their leases as a result of the summary judgment against them, petitioned for certiorari. *Id.*

The jurisdictional issue before the Court was twofold: first, "whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue"; and if so, second, whether the Court could "examine justiciability at this stage" because the state courts had "heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case." *Id.* at 612. On the first question, the Court found that the original

plaintiffs (state taxpayers and a teachers association) did not meet Article III's standing requirements, *id.* at 612-17, although the state courts, not being bound by "the constraints of Article III," were entitled to ignore "federal standing rules in letting the case go to final judgment," *id.* at 617.

The Court therefore reached the second question: whether a state-court judgment in these circumstances could "support jurisdiction in this Court to review the case." *Id.* The Court answered in the affirmative, adopting the rule that, when a state court has issued a judgment in a case where the original plaintiff lacked Article III standing, the Court may nonetheless exercise its certiorari jurisdiction "if the judgment of the state court causes direct, specific, and concrete injury" to the petitioner-defendant. *Id.* at 623-24.

Applying this rule to the petitioner lessees, the Court found that the state-court judgment placed them under a "defined and specific legal obligation, one which causes them direct injury," and that the adverse declaratory judgment was "an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." *Id.* at 617-18. Hence, the Court concluded that the lessees satisfied Article III's injury requirement. *Id.* at 619.

But there is no comparable basis in this case for concluding that Nike satisfies Article III's injury requirement. The only result of the state-court proceedings so far is that Nike's demurrer has been overruled and the case remanded for possible further demurrer proceedings, followed by litigation and trial. See *supra* at 3-4. Unlike the state courts in *ASARCO*, therefore, the California courts have not "heard the case and proceeded to judgment." *Id.* at 612. Hence, the foundation on which this Court concluded it could "examine justiciability at this stage" of *ASARCO* is missing here. *Id.* Until a judgment of some kind is entered against Nike, the *ASARCO* rule cannot be applied.

Even if the Court were to extend *ASARCO* to apply to cases where no judgment of any kind has been entered against the petitioner, Nike cannot show that the California Supreme Court's decision "causes direct, specific, and concrete injury" to Nike. *Id.* at 623-24. The overruling of Nike's demurrer simply means that Nike must now respond to the first amended complaint so that the litigation process can move forward. An order advancing the initial pleading stage is a long way from a finding of liability or the entry of an injunction. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("[T]he alleged harm must be actual or imminent . . . ."). The California Supreme Court's remand order does not place Nike under any "defined and specific legal obligation," nor does the order amount to "an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." 490 U.S. at 617-18. At this point, the state court has entered no judgment, final or otherwise, against Nike, and Nike has suffered no "direct, specific, and concrete injury." Accordingly, Nike lacks Article III standing to seek review in this Court under *ASARCO*.

Although in its current procedural posture this case is not justiciable in this Court, if Nike is found liable in state court (which remains to be determined at trial), it can appeal from the resulting final judgment and then raise its federal claim. This is in notable contrast to *ASARCO*, where, had the Court denied certiorari, the petitioners would have had "to commence a new action in federal court to vindicate their rights under federal law," an action that could have been allowed only "at the cost of much disrespect to state-court proceedings and judgments." *Id* at 623. Again, therefore, it would be an unwarranted extension of *ASARCO* to apply it here.

II. The Court has no jurisdiction in this case, because the California Supreme Court's decision overruling Nike's demurrer is not a "final judgment."

This Court's jurisdiction to review decisions arising from the state courts is limited to "[f]inal judgments or decrees." 28 U.S.C. § 1257(a) (Opp. App. 2a). The statute "establishes a firm final judgment rule," which "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (citation omitted). In this case, the California Supreme Court's decision overruling Nike's demurrer and remanding for further proceedings did not effectively determine the entire litigation, as required by the finality rule. And while this Court has recognized narrowly defined exceptions to that rule, "[t]his case fits within no exceptional category." *Id.* at 84. Hence, there is no "final judgment" here, and the Court lacks jurisdiction at this stage of the proceedings. In addition, because the case is still in its initial pleading stage, the Court would have no developed factual record on which to consider the constitutional issues.

A. The California Supreme Court's decision did not effectively determine the entire litigation.

The relevant aspect of the finality rule here is that "a state-court decision is not final unless and until it has effectively determined the entire litigation." *Jefferson*, 522 U.S. at 84. Thus, the Court has long held that there is no final judgment where the state court has overruled a demurrer, or sustained a demurrer with leave to amend. *See Missouri & Kan. Interurban Ry. v. City of Olathe*, 222 U.S. 185, 186 (1911); *Clark v. City of Kansas City*, 172 U.S. 334, 336, 338 (1899); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-11 (1892); *McComb v. County Comm'rs of Knox County, Ohio*, 91 U.S. 1, 2 (1875). The California Supreme Court, by reversing the trial court's ruling sustaining Nike's demurrer to

the first amended complaint, overruled the demurrer. See *supra* at 3-4. The court's decision has thus paved the way for the completion of the pleading stage, for the conduct of discovery, and finally, "[a]bsent settlement or further dispositive motions," *Jefferson*, 522 U.S. at 81, for the trial. Hence, the decision has not "effectively determined the entire litigation," *id.* at 84, and there is no "final judgment."

B. The California Supreme Court's decision does not fit within any of the exceptions to the finality rule.

In a "limited set of situations," the Court has "found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *Jefferson*, 522 U.S. at 82 (internal quotation marks omitted). In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court "divided cases of this kind into four categories." *Florida v. Thomas*, 532 U.S. 774, 121 S.Ct. 1905, 1909 (2001). The California Supreme Court's decision does not fit into any of these categories.

(1) In the first category, "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* (internal quotation marks omitted); *see, e.g., Cox*, 420 U.S. at 479 (explaining that jurisdiction existed in *Mills v. Alabama*, 384 U.S. 214 (1966), because defendant "had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground"). Here, however, the California Supreme Court remanded the case for purposes of litigation and trial, and Nike has not conceded liability.

(2) In the second category, the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." *Florida v. Thomas*, 121 S.Ct. at 1909 (internal quotation marks omitted). That is not so here, because respondent may fail to establish Nike's liability. *See, e.g., Jefferson*, 522 U.S. at 82 ("Resolution of the state-law claims could effectively moot the federal-law question raised here.").

(3) In the third category, "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Florida v. Thomas*, 121 S.Ct. at 1909 (internal quotation marks omitted). But if Nike is ever found liable, it can seek this Court's review of its federal claim "once the state-court litigation comes to an end." *Jefferson*, 522 U.S. at 82-83.

(4) In the fourth category, two conditions must be met for a case to be excepted from the finality rule: (a) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings"; and (b) "refusal immediately to review the state-court decision might seriously erode federal policy." *Florida v. Thomas*, 121 S.Ct. at 1910 (internal quotation marks omitted). If a case fails to meet either condition, it is not within the fourth category.

(a) As shown by the cases satisfying the first condition, reversal must necessarily put an end to the relevant cause of action. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989) (reversal of state court's decision that reliance on predicate acts of distributing obscene material did not violate First Amendment "would bar further prosecution on the RICO counts at issue here"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179 (1988) (reversal of state court's decision that federal law permitted additional state workers'-compensation award "would preclude any further proceedings"); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (reversal of state court's decision that state statute did not conflict with Federal Arbitration Act would "terminate litigation of the merits of this dispute"); *Belknap, Inc. v. Hale*, 463 U.S. 491, 497 n.5 (1983) (reversal of state court's

decision that federal labor law did not preempt state proceedings "would terminate the state-court action"); *Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (*per curiam*) (were Court to reverse state court's decision rejecting applicability of "federal defense of selective enforcement, there would be no further proceedings in the state courts in this case"); *Cox*, 420 U.S. at 486 (were Court to reverse state court's decision and "hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends"). Unlike the cited cases, this condition is not met here.

A reversal by this Court would mean that the first amended complaint was insufficient under the First Amendment and thus that the California Supreme Court should have sustained Nike's demurrer. But that would not necessarily preclude further litigation on respondent's unfair-competition and false-advertising causes of action. Contrary to Nike's erroneous assertion that the "constitutional questions presented . . . are agreed by all to be outcome determinative," Pet. 28-29, under California law respondent would have the opportunity to cure the defect identified by this Court by filing a second amended complaint, *see* Cal. Civ. Pro. Code § 472a(c) (Opp. App. 5a); Cal. R. Ct. 325(e) (Opp. App. 6a); *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.4th 26, 39, 960 P.2d 513, 519 (1998) ("If a complaint does not state a cause of action, but there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted.").

For example, even though the issue was neither raised by Nike nor addressed by the California Supreme Court, Nike contends that the court's "holding that businesses may be held *strictly liable* for misstatements they may make regarding issues of social importance conflicts with this Court's precedents." Pet. 9 (emphasis added); also *id.* 4, 24, 25, 27, 29. If this Court were to accept Nike's contention, it might agree with the California Supreme Court that the first

amended complaint adequately alleges that Nike's statements are commercial speech, but hold that commercial speakers cannot be found liable for false statements of fact absent proof of some level of culpability. If the Court reversed on the ground that the first amended complaint does not adequately allege that Nike should have known that the statements at issue were false, respondent could file a second amended complaint with the requisite allegations, and litigation on the same causes of action would continue with an additional element of culpability.

(b) To be within the fourth category of exceptions to the finality rule, a case must also meet the second condition: that the absence of immediate review by this Court would seriously erode some important federal policy. *See, e.g.*, *Flynt*, 451 U.S. at 622 (noting that cases meeting this condition have "involved identifiable federal statutory or constitutional policies which would have been undermined by the continuation of the litigation in the state courts"). This condition is not met here either.

It is not enough to meet this condition that Nike relies on a First Amendment claim for its defense. In *Laredo Newspapers, Inc. v. Foster*, 429 U.S. 1123 (1977), the Court denied certiorari because there was "no final judgment within the meaning of 28 U.S.C. § 1257." That was a libel case in which the trial court had entered summary judgment for the defendant newspaper on the basis of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but the state supreme court had reversed and remanded for trial to resolve issues of fact as to whether the plaintiff was in the public-official or public-figure category and to apply "a negligence standard in defamation actions instituted by private individuals." *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 820 (Tex. 1976). As with the newspaper's First Amendment claim in *Laredo Newspapers*, the factual predicate of Nike's First Amendment claim consists of false statements of fact. This

Court has made clear that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Thus, Nike must show that immediate review of the decision below is necessary to prevent erosion of constitutional policy, even though the statements at issue have "no constitutional value."

Nike tries to show this by claiming that "'a rule that would impose strict liability' on a speaker 'for false factual assertions' regarding a matter of public concern 'would have an undoubted "chilling" effect'" on protected speech. Pet. 25 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988), a libel case where the speaker was a publisher and the issue was speech related to public figures). Thus, Nike claims that the California Supreme Court's decision is overly broad and, on that basis, concludes that the decision will chill protected speech. But Nike's claim fails because it is not based on the court's actual decision.

As set forth *infra* at 18-21, the California Supreme Court ruled that particular false statements of fact are subject to regulation *only* if the speaker is engaged in commerce; if the speaker directs its speech to an intended commercial audience; if the speech consists of "representations of fact" about the speaker's own "business operations, products, or services"; and if the speaker makes these factual representations "for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." Pet. App. 18a-19a. As the court emphasized, these requirements are consistent with this Court's explanation for denying protection to false or misleading commercial speech: "the truth of commercial speech is 'more easily verifiable by its disseminator' and . . . commercial speech, being motivated by the desire for economic profit, is less likely to be chilled by proper regulation." *Id.* 20a (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976)).

Thus, when the California Supreme Court's actual decision is considered — holding that commercial speakers can be liable only for making false or misleading factual statements "for the purpose of promoting sales" of their own products — it is evident that rather than chilling protected speech, the decision will deter false or misleading commercial speech. Accordingly, Nike has failed to show that the absence of immediate review will seriously erode constitutional policy.

C. This case is in its initial pleading stage and lacks a developed factual record.

Whether particular statements are properly classified as commercial or noncommercial speech is an issue that generally requires nuanced analysis, turning as it does on disputed questions of fact, such as exactly what statements were made and in what context. As the Court has often emphasized in considering constitutional questions, where context is critical, it is important to ensure "a full development of the relevant facts." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 542 (1986); *see id.* at 542 n.5 ("We have frequently recognized the importance of the facts and the factfinding process in constitutional adjudication. See, e.g., *Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-127 (1981)."); *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964) ("How the facts are found will often dictate the decision of federal claims."); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues."); *Gospel Army v. City of Los Angeles*, 331 U.S. 543, 548 (1947) ("[E]xperience demonstrates that particularly in constitutional cases issues turn upon factual presentation."). But this case is still in the initial pleading stage, and thus it lacks even the most minimal factual record.

The factual record here consists entirely of the allegations of the first amended complaint. The parties have taken no

depositions, filed no factual declarations, declared no experts. Because there has been no trial, there is no trial testimony and no findings of fact by the trial court; and the question of remedies has yet to be reached. Thus, the Court would have to consider the constitutional issues in this case based solely on allegations that are merely assumed to be true for purposes of pleading.

III. The California Supreme Court properly classified the statements at issue as commercial speech for purposes of laws regulating false advertising and other forms of commercial deception.

Because the California Supreme Court's decision is not fairly represented in the petition, it is necessary to summarize that court's analysis and holding before responding to Nike's contentions.

The court stated that its holding was "based on decisions of the United States Supreme Court," Pet. App. 2a, and scrutiny of the opinion confirms that it was firmly grounded on this Court's decisions. The court first examined this Court's decisions concerning the regulation of commercial speech, *id.* 8a-11a, especially in relation to the rule that "commercial speech that is false or misleading is not entitled to First Amendment protection and 'may be prohibited entirely,'" *id.* 10a (citation omitted). Turning to the reasons given by this Court for the distinction between commercial and noncommercial speech, the court noted, first, that the truth of commercial speech "'may be *more easily verifiable by its disseminator* than . . . news reporting or political commentary,'" *id.* 11a-12a (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24); second, that "commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation," Pet. App. 12a; and third, that regulation

of commercial speech serves the state's interest in preventing "commercial harms," *id.* 12a-13a.

The court then considered carefully this Court's decisions distinguishing commercial from noncommercial speech. *Id.* 13a-16a. The court concluded that, while this Court "has not adopted an all-purpose test" to make this distinction, a "close reading" of this Court's decisions suggested "a limited-purpose test." *Id.* 17a. This test would be used for the purpose of deciding "whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception." *Id.* (emphasis deleted); also *id.* 1a-2a, 19a, 20a, 21a, 23a, 29a-30a. The test requires "consideration of three elements: the speaker, the intended audience, and the content of the message." *Id.* 17a-18a.

First, the speaker must be acting as a commercial speaker. *Id.* 18a-19a. A commercial speaker is "someone engaged in commerce," that is, "the production, distribution, or sale of goods or services." *Id.* 18a. Second, the intended or target audience must be "actual or potential buyers or customers of the speaker's goods or services," or persons acting for them, "or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." *Id.* 18a. In articulating these requirements, the court drew on its preceding analysis of this Court's cases, in particular on *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), and *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

Third, "the factual content of the message should be commercial in character." This means that the speech must consist of "representations of fact" about the speaker's "business operations, products, or services" that are "made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." *Id.* 19a, 20a. In stating this requirement, the court drew particularly on *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v.*

Florida Dept. of Bus. & Prof. Regulation, 512 U.S. 136 (1995); *Bolger*, 463 U.S. 60; and *Virginia State Bd. of Pharmacy*, 425 U.S. 748. The court emphasized that its specification of the "content" element was consistent with this Court's reasons (noted *supra* at 18) for denying protection to false or misleading commercial speech, because those reasons assume that "commercial speech consists of factual statements," that the statements describe matters within the speaker's own knowledge, and that the statements "are made for the purpose of financial gain." Pet. App. 20a.

The court then applied these requirements to the statements by Nike at issue in this case, concluding that they "were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." *Id.* 23a. The court found that the first element was met because Nike was engaged in commerce and acting as a commercial speaker. *Id.* 21a. The court found that the second element, "an intended commercial audience," was met because Nike's "intended audience was primarily the buyers of its products." *Id.* 23a. Thus, the court pointed out that "Nike's letters to university presidents and directors of athletic departments were addressed directly to actual and potential purchasers of Nike's products." *Id.* 21a. In addition, the court noted the first amended complaint's allegations that "Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products," since Nike made the statements at issue "'to maintain and/or increase its sales and profits.'" *Id.*

The court also found that the third element, "representations of fact of a commercial nature," was met because "Nike was making factual representations about its own business operations." *Id.* 22a. Thus, "[i]n speaking to consumers about working conditions and labor practices in

the factories where its products are made, Nike addressed matters within its own knowledge" and could "readily verify the truth" of these factual statements. *Id.* Furthermore, "Nike engaged in speech that is particularly hardy or durable." Thus, the first amended complaint alleged that "Nike's purpose in making these statements . . . was to maintain its sales and profits," and the court therefore concluded that regulation to prevent false and misleading speech "is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories." *Id.*

In sum, the California Supreme Court's decision is fully consistent with this Court's prior rulings. Accordingly, the petition fails to raise issues worthy of this Court's review.

A. The decision below does not conflict with this Court's cases defining commercial speech.

Nike contends that the statements at issue are not commercial speech under any of three tests. Pet. 11. First, Nike claims that the statements "obviously" did not propose a commercial transaction "in any respect." *Id.* In fact, the court below relied on this Court's references to commercial speech as, typically, "speech proposing a commercial transaction" in establishing the required elements of a commercial speaker speaking to a commercial audience. Pet. App. 18a; see *supra* at 19. Moreover, Nike's statements proposed commercial transactions by conveying to consumers that they should buy its athletic shoes because, for example, the shoes are made by factory workers whose working conditions comply with "applicable local laws and regulations governing occupational health and safety." See *supra* at 4-5.

Second, Nike claims that the statements at issue do not satisfy the first two factors — advertising and product reference — utilized in *Bolger*, 463 U.S. at 66-67. Pet. 11-12. In fact, the court below relied on *Bolger* in specifying each of the elements required for commercial speech. Pet. App. 13a-15a, 18a-19a; see *supra* at 19-20. Moreover, as to

the first *Bolger* factor, the statements at issue were just as much advertising for Nike and its products as an informational pamphlet was advertising for the company and its products in *Bolger*. 463 U.S. at 62 n.4. As to the second factor, since the statements gave consumers specific product information (namely, the conditions under which Nike's athletic shoes are made), the statements were just as much references to a specific product as the informational pamphlet was in *Bolger*. *Id.* at 66 n.13. Under *Bolger*, as the court below noted, "product references" include "statements about the manner in which the products are manufactured, distributed, or sold." Pet. App. 19a.

Nike also accuses the court below of "holding" that the third *Bolger* factor—acting with economic motivation—is "sufficient." Pet. 12. In fact, the court clearly stated the exact opposite: that *Bolger* "rejected the notion that any of these factors is *sufficient* by itself," Pet. App. 14a, and that *Bolger* "indicated that economic motivation is relevant but not conclusive," *id.* 28a. Moreover, as set forth *supra* at 19, the speaker's "purpose of promoting sales" is not sufficient under the court's decision, but only one of its multiple requirements.

Third, Nike claims that the statements at issue did not "'relate[] solely to the economic interests of the speaker and its audience,'" because Nike was concerned both with "the individual purchasing decisions" of its audience and with "the prospect of legislation restricting multinational investment and production." Pet. 12 (citation omitted). This claim correctly admits what the first amended complaint alleges: that Nike made the statements at issue for the purpose of selling shoes. See *supra* at 4-5. But Nike has no basis in the first amended complaint for its additional assertion that, in making the statements at issue, it was also concerned with "the prospect of legislation." Thus, this claim raises no issue for this Court.

Finally, Nike contends that the court below was "in error" in suggesting that "its decision is tantamount to forbidding the mislabeling of a product." Pet. 14. In fact, the court did not make that suggestion, but rather made the important point that "regulation of Nike's speech about working conditions in factories where Nike products are made is consistent with traditional government authority to regulate commercial transactions for the protection of consumers by preventing false and misleading commercial practices." Pet. App. 22a. The court cited statutes prohibiting "false or misleading statements about where a product was made" or "by whom." *Id.* 22a-23a. Several of the cited statutes prohibit false representations whether on product labels or not. *See* 15 U.S.C. § 1125(a); Cal. Bus. & Prof. Code § 17569 (Opp. App. 1a, 4a).

B. The decision below does not conflict with *Thornhill v. Alabama* or *Thomas v. Collins*.

Nike contends that the decision below conflicts with *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *Thomas v. Collins*, 323 U.S. 516 (1945), Pet. 15-18, because, according to Nike, those cases hold that "statements in the course of a labor dispute are entitled to full First Amendment protection," *id.* 6. But the first amended complaint alleges that Nike, acting as a commercial speaker, directed the statements at issue to a commercial audience for the purely commercial purpose of selling shoes; it did not make the statements as a contestant in a labor dispute or as part of a dispute between an employer and its employees. See *supra* at 4-5. Hence, this contention raises no issue for this Court.

In addition, Nike's conclusion is wrong: the speech of labor disputants does *not* receive "full First Amendment protection." As the Court observed in *Virginia State Bd. of Pharmacy*, for example, in comparing "speech in the special context of labor disputes" with commercial speech: "The speech of labor disputants, of course, is subject to a number

of restrictions." 425 U.S. at 762-63 & 763 n.17. Thus, like commercial speech, the speech of labor disputants is protected by the First Amendment, but nevertheless can be regulated.

Finally, Nike's contention fails because, as the California Supreme Court pointed out, *Thornhill* and *Thomas* do not suggest that "the state lacks the authority to prohibit false and misleading factual representations, made for purposes of maintaining and increasing sales and profits, about the speaker's own products, services, or business operations." Pet. App. 24a-25a.

C. The decision below does not conflict with this Court's cases prohibiting "viewpoint discrimination."

Nike contends that the decision below conflicts with this Court's cases prohibiting "viewpoint discrimination," Pet. 19-22, which, according to Nike, require "an equality of status in the field of ideas" and an equal opportunity for "all points of view," *id.* 20 (internal quotation marks omitted). But as alleged in the first amended complaint, the statements at issue are specific statements of fact about the conditions under which Nike's shoes are manufactured, not expressions of "ideas" or "points of view." See *supra* at 4-5. The California Supreme Court made this point by noting that "the regulations in question do not suppress points of view but instead suppress false and misleading statements of fact." Pet. App. 26a. Thus, this contention raises no issue for this Court either.

In addition, this Court has made clear that "there can be *no constitutional objection* to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 563 (emphasis added). Hence, as the court below emphasized, "a law that prohibits only such unprotected speech cannot violate

constitutional free speech provisions." Pet. App. 27a. California's unfair-competition and false-advertising laws are precisely such laws: they apply only to speech satisfying the court's requirements for commercial speech, see *supra* at 19-20, which, as the court said, is speech that "concerns facts material to commercial transactions," Pet. App. 27a. Thus, contrary to Nike's suggestion, these laws regulate false and misleading commercial speech only because of its "'constitutionally proscribable content.'" Pet. 21 (citation omitted).

Nike also claims that the decision below permits suit under these laws against Nike, a commercial speaker, for its false statements of fact about the working conditions in the factories manufacturing its shoes, while "immuniz[ing] from suit" the noncommercial speakers who disclosed the working conditions. *Id.* But the California Supreme Court did not "immunize" noncommercial speakers for false statements of fact about these conditions. On the contrary, the court pointed out that noncommercial speakers are subject to suit for the injurious falsehood of their factual statements (e.g., as product disparagement or trade libel). See Pet. App. 27a. The court noted that liability would require proof of the speaker's knowledge (or reckless disregard) of the statements' falsity, citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513 (1984), but damages could be awarded against the speaker for harm caused to the company, which is a remedy that is not available against Nike here.

D. The decision below does not conflict with this Court's cases concerning commercial speech that is "inextricably intertwined" with noncommercial speech.

Nike contends that the decision below conflicts with this Court's cases concerning commercial speech that is "inextricably intertwined" with noncommercial speech. Pet. 22-23. The basis for this contention is Nike's claim that it "was under a '*practical* compulsion' . . . to discuss its

operations," *id.* 22 (citation omitted), and that "as a practical matter" it must refer "to its own products and practices," *id.* 23. But the first amended complaint does not support the claim that Nike was under a "practical" compulsion to combine any of the particular statements at issue with any statements of noncommercial speech. See *supra* at 4-5. On the contrary, as alleged in the first amended complaint, the statements at issue were *not* "inextricably intertwined" with noncommercial speech. *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) ("*No law of man or of nature makes it impossible* [to convey the particular commercial and noncommercial messages separately]. *Nothing in the resolution prevents* the speaker from conveying . . . these noncommercial messages, and *nothing in the nature of things requires* them to be combined with commercial messages.") (emphasis added).

E. The decision below does not impermissibly chill protected speech.

Nike contends that the decision below impermissibly "chills protected speech far beyond California's borders." Pet. 23-30 (quoting section heading, *id.* 23). As explained *supra* at 16-17, Nike claims that the decision is overly broad and, on that basis, concludes that it will chill protected speech. But Nike's claim is not based on the actual decision, and thus Nike has no basis for this claim.

Nike also denies that "the questions presented could be ventilated in other jurisdictions, much less that a conflict would later emerge for this Court to resolve." Pet. 29. Whether that is correct of Nike's second Question Presented is impossible to say, because that question is too vaguely stated to permit a comparison with other jurisdictions. But Nike's first Question Presented concerns whether statements in certain circumstances are commercial speech, and that question could of course arise in any jurisdiction with "unfair trade practice" or "false advertising laws." *Id.*

Finally, Nike claims to establish its own "extraordinary chilling effect" by asserting that "Nike has substantially restricted its communications on social issues," including not releasing "publicly" its "next annual" Corporate Responsibility Report, which describes its actions on "matters such as labor compliance, community affairs, sustainable development, and workplace programs." *Id.* 28. As of the date of this opposition, however, one of Nike's public web sites on the Internet contains discussions in various formats of these very issues, including those that are the subject of the statements at issue in this case, and contains in full Nike's first Corporate Responsibility Report, released in October 2001. See *<http://nikebiz.com>*, under topic headings such as "Global Citizenship: Community Affairs, Environment, Manufacturing Practices, Reporting"; "News: Press Releases"; and "Frequently Asked Questions: Labor Practices."

CONCLUSION

For these reasons, the Court should deny Nike's petition for a writ of certiorari.

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November 14, 2002

APPENDIX

Lanham Act § 43(a), 15 U.S.C. § 1125(a)

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrep resents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

28 U. S. C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

California Business and Professions Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Business and Professions Code § 17203

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business and Professions Code § 17204

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17500

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made

or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

California Business and Professions Code § 17535

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17569

It is unlawful to barter, trade, sell, or offer for sale or trade, any article represented as made by authentic American Indian labor or workmanship, unless the basic article was produced wholly by American Indian labor or workmanship.

Any article bearing a trademark or label registered by Indian persons, groups, bands, tribes, pueblos, or communities with the Indian Arts and Crafts Board in Washington, D.C., or with the American Indian Historical Society, Incorporated, in San Francisco, California, shall be presumed to be authentic.

Only those articles bearing a registered trademark or label of authentic Indian labor or workmanship may be deemed an art or craft of authentic Indian labor or workmanship.

California Code of Civil Procedure § 472

Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment.

California Code of Civil Procedure § 472a(c)

When a demurrer is sustained, the court may grant leave to amend the pleading upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed. When a demurrer is stricken pursuant to Section 436 and there is no answer filed, the court shall allow an answer to be filed on terms that are just.

California Code of Civil Procedure § 472c(a)

When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.

California Rules of Court 325(e)

Following a ruling on a demurrer, unless otherwise ordered, leave to answer or amend within 10 days shall be deemed granted, except for actions in forcible entry, forcible detainer or unlawful detainer in which case five calendar days shall be deemed granted.

California Rules of Court 976(d)

Unless otherwise ordered by the Supreme Court, no opinion superseded by a grant of review, rehearing, or other action shall be published. After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the Court of Appeal published in whole or in part.

NOV 26 2002

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY.

On Petition for a Writ of Certiorari
to the Supreme Court of California

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REPLY BRIEF FOR THE PETITIONERS

The petition for certiorari and the *amicus* briefs demonstrated that this Court should grant certiorari. Respondent's arguments that this Court is powerless to do so – either because there is no Article III case or controversy or because the case does not present a sufficient federal interest to justify review now under 28 U.S.C. 1257(a) – lack merit. Article III is satisfied because the California Supreme Court's decision definitively rejected petitioners' First Amendment defense to liability and accordingly presents an "actual or threatened" injury to petitioners. Section 1257(a) is satisfied because that decision immediately threatens federal interests – both by chilling valuable protected speech and by check-mating the decision of other sovereigns to leave that speech free from such regulation. Respondent's remaining arguments merely rehearse the flawed First Amendment analysis of the majority below.

I. Article III Is No Obstacle To Review In This Court.

Because the California Supreme Court's decision directly threatens petitioners with injury, this case is properly before this Court. See *ASARCO* v. *Kadish*, 490 U.S. 605 (1989). Like petitioner Kasky, the *ASARCO* plaintiffs lacked Article III standing because they had suffered no personal injury but had merely brought a citizen suit. This Court held, however, that the case was properly brought here. Because it was "*petitioners*, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts," the Court held that there was no obstacle to review because "*petitioners* have standing to invoke the authority of a federal court and * * * this dispute now presents a justiciable case or controversy for resolution here." *Id.* at 618 (emphases added). *ASARCO* thus requires only that the petitioner establish Article III standing in this Court. Accord Robert L. Stern et al., SUPREME COURT PRACTICE § 18.1, at 814 (8th ed. 2002) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III standing requirements at that point.") (citing *ASARCO*).

Quoting its seminal decision in *Warth* v. *Seldin*, 422 U.S. 490, 500, 501 (1975), this Court in *ASARCO* held that standing existed because "[p]etitioners are faced with '*actual or threatened* injury' that is sufficiently 'distinct and palpable' to support their standing to invoke the authority of a federal court." 490 U.S. at 618 (emphasis added). See also *id.* at 619 ("they personally have suffered some *actual or threatened* injury" (citation omitted)). Kasky fails to offer any reason why this Court should now modify *ASARCO* and employ a heightened standing (or ripeness) requirement.[1]

Each factor that established standing in *ASARCO* is equally present in this case:

> Petitioners contend before us that the Arizona Supreme Court's decision rests on an erroneous interpretation of federal statutes. They claim that the declaratory judgment sought and secured by respondents, along with the relief that may flow from that ruling, is invalid under federal law. If we were to agree with petitioners, our reversal of the decision below would remove its disabling effects upon them.

Id. The injury in this case is more palpable than even in *ASARCO*, because petitioners not only face the prospect that an award will be entered against them in this case, but also presently labor under the "defined and specific legal obligation" (BIO 10) to conform their speech to the California Supreme Court's definitive construction of that state's statutes and its narrow reading of the First Amendment. Cf. *Blatz Brewing Co.* v. *Collins*, 88 Cal. App. 2d 438, 444-45 (Cal. 1948) (appellate court's rulings are "law of the case, and are not open to question on a subsequent appeal"). Indeed, even respondent concedes that, if the relief he seeks is granted, petitioners will suffer an

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[1] Petitioners' injury also satisfies the formulation Kasky quotes – "direct, specific, and concrete injury" (*ASARCO*, 490 U.S. at 623)) – which did not purport to announce a more rigorous test for standing. Indeed, that formulation did not state a test at all but rather set forth the *ASARCO* Court's "*rationale* for [its] decision on this jurisdictional point." *Id.* (emphasis added).

Article III injury. See BIO 10. The distinct and present threat that such relief will be granted on remand confers standing.

That petitioners face an "actual or imminent injury" sufficient to satisfy Article III is confirmed by the law governing declaratory judgment and injunction actions. Respondent recognizes, as he must, that an "adverse declaratory judgment [is] 'an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts.'" BIO 9 (quoting *ASARCO*, 490 U.S. at 617-18). Petitioners' demurrer in the superior court is functionally indistinguishable from a request for a declaratory judgment that California's Unfair Trade Practice and False Advertising statutes violate the First Amendment and an injunction against the enforcement of those statutes. It is settled that plaintiffs have Article III standing to bring such an action when, as in this case, they face the immediate prospect of the statute's enforcement. *E.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."); 12 MOORE'S FEDERAL PRACTICE (CIVIL) § 57.22[8][a][1]. Indeed, the fact that petitioners are required to litigate the constitutionality of the state statutes' restriction on their speech is itself a constitutionally sufficient injury. See Center for Indiv. Freedom *Amicus* Br. ("CIF Br.) 3-4, 7-8.[2]

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[2] Nor is Kasky correct that, in supposed contrast to *ASARCO*, "no judgment of any kind has been entered against Nike in state court." BIO 8. The California Supreme Court's decision did produce a "judgment" against Nike, just as the Arizona Supreme Court's decision in *ASARCO* produced a "judgment" against the private lessees. See Cal. Code Civ. P. § 912 (termination of appeal produces a "judgment of the reviewing court"). Kasky's statement that the petitioners in *ASARCO* "would lose their leases as a result of the summary judgment against them" by the Arizona Supreme Court (BIO 8) is likewise incorrect: the Arizona Supreme Court did *not* determine the validity of the petitioners' leases, but rather declared certain state statutes invalid under federal law and remanded for further proceedings regarding what "relief, *if any*, might be appropriate" with respect to the individual leases. *ASARCO*, 490 U.S. at 610 (emphasis added).

Article III is accordingly no obstacle to review in this Court.

II. This Case Falls Within This Court's Jurisdiction Under 28 U.S.C. 1257(a) And Offers An Ideal Vehicle To Resolve The Questions Presented.

1. Respondent acknowledges, as he must, that this Court has jurisdiction under the so-called "fourth *Cox* category" to review a state court ruling if (i) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (ii) "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). See BIO 13. This is a textbook case for application of that basic jurisdictional rule.

Respondent's concession that a ruling by this Court in petitioner's favor would require dismissal of his complaint as pleaded (BIO 14) ends the first inquiry. A ruling by this Court in petitioner's favor would deem the state law causes of action pleaded by Kasky, and definitively construed by the California Supreme Court in this case, unconstitutional as applied. Kasky nonetheless argues that this Court's jurisdiction is defeated by the mere possibility that the complaint hypothetically could be amended to add allegations *not* required by state law but intended to satisfy the requirements of a later ruling by this Court. Accepting that view would gut the vital role of the fourth *Cox* category. *Cox* did not require that the petitioner's vindication

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Respondent also errs in contending (BIO 10) that *ASARCO* is distinguishable because petitioners in this case could seek certiorari from a later adverse judgment. The *ASARCO* petitioners were free to seek further review if they lost on remand. See, *e.g.*, Br. for U.S. as *Amicus Curiae*, *ASARCO* 12-13 ("If petitioner's leases are declared void on remand, the federal question they seek to resolve now would not be moot and no disability that does not now presently exist would bar them from seeking review." (citation omitted)). This Court mentioned the prospect of the *ASARCO* petitioners "commenc[ing] a new action in federal court" (490 U.S. at 623, *quoted in* BIO 10) only as a means of securing immediate federal court review if this Court had elected to "*dismiss* the case at this stage" (490 U.S. at 623 (emphasis added)).

negate every imaginable theory of liability, but only that the relief sought from this Court would dispose of "the relevant cause of action *rather than merely controlling the nature and character of*, or determining the admissibility of evidence in, *the state proceedings*." 420 U.S. at 482 (emphasis added). And Kasky conclusively admitted below that if petitioners' statements do not constitute "commercial speech," "then the ultimate issue is resolved in Nike's favor, *and the statements are immune from state regulation*." Resp. CA S. Ct. Br. 1 (emphasis added).[3]

Respondent does not dispute that it would "seriously erode federal policy" under the fourth *Cox* category to decline to review a state court ruling that presents a substantial risk of chilling First Amendment expression. See BIO 15-17. The petition already disproved the assertion of the majority below (which Kasky just repeats) that its decision will only "deter false or misleading commercial speech." *Id.* 17. The decision below makes it exceedingly dangerous for corporate speakers to utter any factual statements about their operations unless they can first be absolutely certain those statements will later be deemed entirely truthful and non-misleading.

Hence, this case comfortably fits the fourth *Cox* category, as reflected by the precedents cited in the petition and in the *amicus*

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[3] The superior court properly dismissed the complaint "WITHOUT LEAVE TO AMEND" (Pet. App. 80a) and Kasky did not challenge that aspect of the ruling in the California Supreme Court. Kasky also offers no coherent explanation of what such an amendment would say. He states that he might allege that petitioners acted with "some level of culpability" (BIO 15), but the complaint already makes that claim (see Pet. 4 (citing allegations of negligence)). Respondent has not amended his complaint to state a still higher degree of culpability (indeed, he has agreed to a stay of the case pending this Court's disposition); he conspicuously does not allege that he actually *would* amend the complaint in that (or any other) fashion; and he does not suggest even obliquely that he ethically *could* do so (given that he concededly knows nothing about the underlying facts). Indeed, there is every reason to believe no further amendment would be forthcoming, given that respondent had every reason to plead the strongest possible complaint that he could the last time around.

briefs. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1988). See Pet. 29 (citing *Fort Wayne Books*, *supra*; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)); Exxon-Mobil *Amicus* Br. 5-7 (citing, as well, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377 (1992); *Keller* v. *State Bar*, 496 U.S. 1 (1990); *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767 (1986)). Compare *Foster* v. *Laredo Newspapers*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977) (one-sentence order denying certiorari in case in which state supreme court had *not* resolved federal issue of what category of libel governed case), *cited in* BIO 15. Indeed, the federal interests at stake are of even greater moment here than in those cases, in which the governmental regulation targeted a relatively narrow class of speakers and usually involved speech on a narrow set of issues. This case, by contrast, involves factual speech by *any* business on virtually *any* issue. See, *e.g.*, Media *Amicus* Br. 2-4. Furthermore, this case involves speech on matters of profound public interest and importance, heightening the sacrifice to "federal policy" (*Cox*, *supra*) of leaving the decision below unreviewed.

There is no merit to the invocation by the majority below, which Kasky simply repeats (BIO 16 (quoting Pet. App. 20a)), of the theory that commercial speech is less likely to be chilled than other speech – a theory applicable at most to speech that consists of "*advertising*" (*Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976) (emphasis added)), "the *sine qua non* of commercial profits" (*id.*) that can easily be verified by the seller in advance (*Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring)). To the contrary, numerous features of the liability scheme approved in this case make it far *more* likely that a wide swath of indisputably protected speech will be chilled. See, *e.g.*, Pet. 24 (liability is "strict" and applies whether or not speaker made best efforts to verify facts); *id.* 24-25 (potentially massive monetary awards can result); *id.* 25 (liability attaches to statements regarding any business practice); *id.* 25-26 (liability attaches to statements in any forum, including newspaper editorials or statements on the internet); *id.* 26 (liability attaches even to statements made to third parties that corporation cannot control, such as "reporters or reviewers"); *id.* 27 (statute gives private attorney general status to each of California's 34 million residents); *id.* 27-28 (scheme imposes substantial litigation costs even for non-meritorious claims). See generally CIF Br. 4-7. To none of these problems has Kasky offered a word of response.

2. Beyond even the First Amendment issues it raises, this case is of profound import because California law now supersedes the choice of every other state and the federal government to leave speech like petitioners' unregulated. See Pet. 23-24, 26. The adverse effects of the California court's ruling on the exercise of federal rights in "other States" undermines federal interests for purposes of the *Cox* analysis. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988). As the petition explained, and as *amicus* Civil Justice Association of California amplifies (at 15-20 & app.), no other jurisdiction in the country would recognize Kasky's claim. And it is undisputed that California's law extends to statements by businesses made *anywhere in the world*, given that materials on the internet and in any substantial publication are all regularly received in California.[4]

3. Finally, this case offers the Court an ideal vehicle to decide the questions presented. Kasky's argument that this Court needs to know "exactly what statements were made and in what context" (BIO 17) is baffling. The complaint and its attachments set out all the statements at issue and their context. See generally Pet. Lodging. Every member of the three courts below felt perfectly capable of determining whether petitioners' statements were "commercial speech" on the existing record, and no

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[4] Kasky is correct (BIO 27) that Nike has not withdrawn from publication a previously distributed Corporate Responsibility Report; that would be a pointless exercise. The relevant and indisputable point is that the decision below has caused Nike to reduce substantially its communications on the wide range of issues encompassed by the decision below – including particularly labor and environmental issues.

party has ever suggested that some further factual record needed to be compiled on the matter. Further, as the petition explained, because petitioners' argument is precisely that this case must be dismissed at the outset, it would make little sense to review the case in any *other* posture.

This Court accordingly has jurisdiction to decide this case on the merits.

III. The Decision Below Conflicts With This Court's Precedents.

The petition for certiorari demonstrated that the decision below conflicts with this Court's First Amendment precedents. Respondent principally regurgitates the analysis of the majority below, which is deeply flawed for the reasons described in the petition and the *amicus* briefs. Respondent's remaining arguments are meritless.

1. Not only does the decision below conflict with the three definitions of "commercial speech" that this Court has propounded, but Kasky does not dispute that this case presents an ideal opportunity to rationalize those competing formulations.

a. The "no more than propose a commercial transaction" formulation. Kasky asserts that "Nike's statements proposed commercial transactions by conveying to consumers that they should buy its athletic shoes because, for example, the shoes are made by factory workers whose working conditions comply with 'applicable local laws and regulations governing occupational health and safety.'" BIO 21. But none of those statements even *mentioned* Nike shoes. Nor does even Kasky claim that Nike's statements did "no more than" propose a commercial transaction. Indeed, the undeniable and decisive fact is that Nike did not propose a transaction *at all*. Nike simply described itself and the operations of its contract facilities.

b. The *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), formulation. It is obviously inaccurate to call the statements in this case – made, for example, in letters to the editor and newspaper interviews, none of which identified a *single* Nike product – "just as much advertising for Nike and its products" (BIO 22) as the pamphlets in *Bolger*, which were "conceded to be advertisements" (463 U.S. at 66) because they identified the company (Trojan) and its products (condoms), and because Trojan held a near-monopoly share of the market, so that the absence of detailed product information was immaterial (*id.* at 66 n.13). Indeed, respondent's argument highlights the practical reality that the decision below renders a corporate speaker's "economic motivation" sufficient to transmute *all* of its statements on factual matters into "commercial speech." Contra BIO 22. For the only additional factor Kasky and the majority below identify – that the speaker must intend to reach consumers – describes almost *every* statement a corporation makes and is thus no limitation at all.

c. The "expression related solely to the economic interests of the speaker and its audience" formulation. The fact that Kasky's complaint alleges "that Nike made the statements at issue for the purpose of selling shoes" (BIO 22) misses the point entirely: Kasky's own theory is that petitioners' statements led listeners to make a *moral* decision that Nike was a company worthy of their business. (The BIO's later statement that the complaint alleges that Nike spoke "for the *purely* commercial purpose of selling shoes" (BIO 23 (emphasis added)) is a misrepresentation: there is no such allegation in the complaint.) The precise allegations of Kasky's own complaint do not in any event dissipate the conflict with this Court's precedents created by the California Supreme Court's legal holding that speech is "commercial," and therefore receives substantially lessened First Amendment protection, whenever the speaker had a commercial motive in mind, regardless of the *effects* of the speech on listeners' non-economic decisionmaking.[5]

2. The decision below furthermore conflicts with *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), and *Thomas* v. *Collins*, 323 U.S. 516 (1945), which hold that statements on labor issues are protected speech regardless of the speakers' intent to influence purchasing decisions. It makes no more difference that Nike

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[5] This case is, in addition, an appropriate vehicle to resolve the circuit conflict over the test for identifying "commercial speech" that is described in the *amicus* brief of the Chamber of Commerce (at 5-8).

sought to influence consumers (BIO 23) than it did that the labor picketing in *Thornhill* was intended to influence "customers and prospective customers" (310 U.S. at 99) or that the labor leader in *Thomas* sought to solicit new members (323 U.S. at 533-34, 537). And the speech in those cases manifestly *did* receive full First Amendment protection; Kasky fails to recognize the basic point that even fully protected speech "can be regulated" (BIO 24) in appropriate circumstances.

3. This Court essentially disposed of Kasky's claim that a one-sided restriction on "false" commercial speech cannot give rise to prohibited viewpoint discrimination (BIO 24-25) in *R.A.V.* v. *St. Paul*, 505 U.S. 377, 383-84 (1992), which rejected the argument that there "are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." Although respondent suggests that Nike's accusers might be sued for "product disparagement or trade libel," he admits that such claims are subject to the substantially more rigorous "reckless disregard" standard. BIO 25. Further, the fact that "damages could be awarded for harm caused to the company" (*id.*) gets the point precisely backwards: in contrast to a *Kasky* claim, such a suit may not be brought by private attorneys general who allege no personal injury at all.

4. Finally, respondent cannot avoid the conflict with this Court's holdings that commercial speech is fully protected when "inextricably intertwined" with noncommercial speech. See Pet. 22-23. The fact that statements of opinion on matters of public importance cannot be credibly made without including statements of fact is a matter of common sense that cannot be defeated by alleging the contrary in a complaint. Contra BIO 26.

This case merits plenary consideration because few cases in the past quarter-century have presented so clear a conflict with this Court's First Amendment precedents or such a clear threat to the freedom of speech in America.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 26, 2002

Supreme Court, U.S.
FILED
NOV 12 2002
OFFICE OF THE CLERK

No. 02-575

In the
Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Pacific Legal Foundation, California Manufacturers and Technology Association, and California Chamber of Commerce respectfully request leave of the Court to file this brief amicus curiae in support of Petitioners.[1] Counsel for Nike consents to the filing of this brief; however, counsel for Kasky withheld consent.

INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) was founded 29 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise. PLF established a Free Enterprise Project in which it submits amicus briefs in cases impacting America's economic vitality. For example, PLF filed amicus briefs in *Chevron, U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002), *Adams v. Florida Power Corp.*, 122 S. Ct. 643 (2001), and *Pharmaceutical Research and Manufacturers of America v. Concannon*, Supreme Ct. Docket No. 01-188. PLF also filed an amicus brief in this case in the court below.

The California Manufacturers and Technology Association (CMTA) (formerly the California Manufacturers Association) works to improve and preserve a strong business climate for California's 30,000 manufacturers, processors, and technology based companies. Since 1919, CMTA has worked with state government to develop balanced laws, regulations, and policies that stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

represents businesses from the entire manufacturing community—a segment of California's economy that contributes more than $250 billion annually and employs more than 2 million Californians.

The California Chamber of Commerce is a voluntary, nonprofit, California-wide business association with more than 15,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the Chamber's members are small- or medium-sized businesses which it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business. The Chamber is involved with legislative, regulatory, and judicial issues involving corporate free speech and the business community.

Amici will augment Petitioners' arguments by illustrating the wide range of situations that will be affected by the California Supreme Court's decision in this case. Justice Brown's dissenting opinion below implored this Court to review this case and to reconsider the current commercial speech doctrine, which no longer provides adequate guidance in a time when commercial and noncommercial speech are blurred beyond the ability of courts to separate them. Amici believe that this case presents an adequate record as well as fully developed legal arguments that make this case appropriate for review by this Court.

For all the foregoing reasons, the motion of Pacific Legal Foundation, California Manufacturers and Technology Association, and California Chamber of Commerce to file a brief amicus curiae should be granted.

DATED: November, 2002.

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate—writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance—may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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Bates v. State Bar, 433 U.S. 350 (1977) 1

Board of Trustees of the State Univ. v. Fox, 492 U.S. 469 (1989) 1-2

Bolger v. Youngs Drug Product Corp., 463 U.S. 60 (1983) 8, 10

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 1-3, 7-9

Citizens United for Free Speech II v. Long Beach Township Board of Commissioners, 802 F. Supp. 1223 (D.N.J. 1992) 8

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 3

Cohen v. California, 403 U.S. 15 (1971) 4

Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n, 149 F.3d 679 (7th Cir. 1998) 3

Dillon v. Legg, 441 P.2d 912 (Cal. 1968) 7

Edenfield v. Fane, 507 U.S. 761 (1993) 10

First National Bank v. Bellotti, 435 U.S. 765 (1978) 4

Ford Motor Co. v. Texas Dept. of Transp., 264 F.3d 493 (5th Cir. 2001) 16

Foster-Gardner, Inc. v. National Union Fire Ins. Co., 959 P.2d 265 (Cal. 1998) 7

Granite Mgmt. Corp. v. Aetna Cas. & Sur. Co., 37 Fed. Appx. 262, 2002 U.S. App. LEXIS 10836 (9th Cir. June 4, 2002) 7

TABLE OF AUTHORITIES—Continued

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Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) 3

Hornell Brewing Co. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993) 8

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 3

McGregor Co. v. Heritage, 631 P.2d 1355 (Or. 1981) 6

MD II Entertainment, Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994) 8

Molien v. Kaiser Foundation Hospitals, 616 P.2d 813 (Cal. 1980) 7

Montgomery v. Montgomery, 60 S.W.3d 524 (Ky. 2001) 12-13

New York Times v. Sullivan, 376 U.S. 254 (1964) 4

Nordyke v. Santa Clara County, 110 F.3d 707 (9th Cir. 1997) 3

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 1

Oxycal Lab., Inc. v. Jeffers, 909 F. Supp. 719 (S.D. Cal. 1995) 3

Planned Parenthood Fed'n of America, Inc. v. Bucci, 1997 U.S. Dist. LEXIS 3338 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 1998 U.S. App. LEXIS 22179 (2d Cir. Feb. 9, 1998), *cert. denied*, 525 U.S. 834 (1998) 16

Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) 1

Quinn v. Aetna Life & Casualty Co., 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) . . . 19

TABLE OF AUTHORITIES—Continued

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Quinn v. Aetna Life & Casualty Co., 96 Misc. 2d 545, 409 N.Y.S.2d 473 (1978) 18-19

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 8

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 10

Rutledge v. Liability Ins. Indus., 487 F. Supp. 5 (W.D. La. 1979) 19

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990) 9

Valentine v. Chrestensen, 316 U.S. 52 (1942) 1

Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997) 8

Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272 (2d Cir. 1981) 20

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 1

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 1, 7

W.C. Richards Co. v. Hartford Accident & Indem. Co., 724 N.E.2d 63 (Ill. 1999) 7

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 12

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) 8-9

Miscellaneous

Abrams, Floyd, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28 2-3

Ad Follies, Advertising Age, Dec. 24, 1990, at 24 10

TABLE OF AUTHORITIES—Continued

Page

Binole, Gina, *After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting*, Portland Bus. J. (June 28, 1999) (http://forests.org/archive/canada-/weywonts.htm) (visited Oct. 24, 2002) 17

Deutsch, Askan, *Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition*, 11 Marq. Sports L. Rev. 41 (2000) 13

Edsall, Thomas B., *Drug Industry Financing Fuels Pro-GOP TV Spots*, Washington Post, Oct. 23, 2002, at A11 19

Elliott, Stuart, *Real or Virtual? You Call It*, New York Times, Oct. 1, 1999, at C1 13

Emord, Jonathan W., *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991) 18

Epstein, Robert, *Public-Interest Group Tilts at Commercial Windmills*, L.A. Times, June 6, 1991, at F7 11

Farber, Daniel, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372 (1979) 18

Goldberg, Michelle, *Confessions of an Undercover Drink Fink*, Salon (Dec. 9, 1997) (http://www.salon.com/media-/1997/12/09media.html) (visited Sept. 28, 2002) 14

Grodin, Joseph R., *Are Rules Really Better Than Standards*, 45 Hastings L.J. 569 (1994) 6

TABLE OF AUTHORITIES—Continued

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Harrelson, Michael, *The Fat Man Sings: Meet the 300-Pound Guerrilla of Undercover Marketing*, Nightclub & Bar Magazine (Feb. 2002) (http://www.nightclub.com/magazine-/February02/cover.html) (visited Sept. 24, 2002) 14

Hartman, Cathy L. & Beck-Dudley, Caryn L., *Marketing Strategies and the Search for Virtue: A Case Analysis of The Body Shop, International*, 20 J. of Bus. Ethics 249-63 (1999) .. 17-18

Kershen, Drew L., *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 Drake J. Agric. L. 141 (1999) 16

Khermouch, Gerry & Green, Jeff, *Buzz Marketing*, Business Week, July 30, 2001, at 54 14

Kozinski, Alex, & Banner, Stuart, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990) 4, 8, 12

Lin, C.C. Laura, *Note: Corporate Image Advertising and the First Amendment*, 61 S. Cal. L. Rev. 459 (1988) 16

Lively, Donald E., *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289 (1987) 8

Loving, Paul E., *The Justice of Certainty*, 73 Or. L. Rev. 743 (1994) 6

Madow, Michael, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125 (1993) 11

TABLE OF AUTHORITIES—Continued

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Nord, Thomas, *Stealth marketing—is it the next big thing or just a big fat flop?*, The Courier-Journal (Louisville, KY) (August 3, 2001) (http://www.courier-journal.com/features/columns/popculture/fe20010803pop.html) (visited Sept. 24, 2002) 14

Peterson, Melody, *Heartfelt Advice, Hefty Fees: Side Effects of Celebrity Drug Pitches Debated*, New York Times, Aug. 11, 2002, § 3, at 1 11-12

Post, Robert, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000) 8

Rees, Victoria L., *AIDSphobia: Forcing Courts to Face New Areas of Compensation for Fear of a Deadly Disease*, 39 Vill. L. Rev. 241 (1994) 7

Rothenberg, Randall, *Now, Novels Are Turning Promotional*, N.Y. Times, Jan. 13, 1989, at D5 11

Shiffrin, Steven, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212 (1983) 3

Smolla, Rodney A., *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777 (1993) 9-10

Snyder, Steven L., *Note: Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?* 1992 U. Ill. L. Rev. 301 (1992) 10-11

TABLE OF AUTHORITIES—Continued

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Stafford, Leon/Cox News Service, *Use of 'stealth' marketing raises questions of ethics* (Aug. 29, 2002) (http://www.coxnews.com/newsservice-/stories/2002/0829-STEALTH-ADS-COX.html) (visited Sept. 24, 2002) 11

Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess. 1149 (1978) 16

Tincher, Rex, *Stealth Marketing in Usenet News Groups* (http://216.239.53.100/search?q=cache:pra0aYbfAtwC:www.dnaco.net/~tinc/stealth.htm+stealth+marketing+usenet&hl=en&ie=UTF-8) (visited Oct. 24, 2002) 15

Vranica, Suzanne, *Advertising: That Guy Showing off His Hot New Phone May Be a Shill*, Wall St. J., July 31, 2002, at B1 13-14

Website for Evenflo products, http://www.evenflo.com/yb/index.phtml (visited Oct. 29, 2002) 15

Website for Gerber products, http://www.gerber.com/main.asp (visited Oct. 29, 2002) 15

SUMMARY OF ARGUMENT

In the past 60 years, this Court's approach to speech uttered by business interests ranged from zero protection (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), to very high protection (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), to a four-part test (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), which has itself undergone revision (*Board of Trustees of the State Univ. v. Fox*, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus)). The analyses have differed depending on the speaker (*Bates v. State Bar*, 433 U.S. 350, 384 (1977), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) (lesser protection accorded to attorney solicitations)) and the social worth of the activity promoted (*Compare Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342, 348 (1986) (upholding restrictions on advertisements for legal gambling facilities), *with Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down)). The divergent lines of commercial speech jurisprudence have produced a well of confusion, the most extreme example of which is the California Supreme Court decision below.

Looking to the future, corporate speech takes many different forms and addresses issues far beyond offering to sell widgets at low, low prices. And even when the speech is fairly straightforward in its attempt to bolster a bottom line, it is so frequently intermingled with otherwise protected speech that courts simply cannot determine where the speech falls in the tangled web of cases comprising the "commercial speech doctrine." Only this Court can cut through the clutter. This case presents a perfect opportunity to do so.

For these reasons, the Petition for a Writ of Certiorari to the California Supreme Court should be granted.

ARGUMENT

I

NIKE'S PETITION SHOULD BE GRANTED SO THIS COURT CAN ADDRESS A MATTER OF CRITICAL PUBLIC CONCERN: THE LEVEL OF SCRUTINY APPLIED TO SPEECH UTTERED BY BUSINESS INTERESTS

The variety and pervasiveness of commercial and mixed commercial/noncommercial speech present in the market today cannot be analyzed adequately under the modern commercial speech doctrine. The decision below relies on this Court's cases, but in so doing, unmoors the precedents from the underlying source—the First Amendment. To prevent consumers from hearing misleading corporate speech, the California Supreme Court sought to prevent consumers from hearing misleading speech by holding that *all* corporate speech deserves only minimal constitutional protection. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 566, this Court formulated a four-part test against which restrictions on commercial speech would be weighed:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

This Court later expanded *Central Hudson*'s inherent flexibility. *See, e.g., Board of Trustees of the State Univ. v. Fox*, 492 U.S. at 480 (requiring a "reasonable fit" rather than the least restrictive means to comply with the fourth prong). Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw," Abrams,

Floyd, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28. *See also* Shiffrin, Steven, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1222 (1983) ("commercial speech" was "an empty vessel into which content is poured").

Even this Court has been unable to apply the *Central Hudson* analysis in any predictable way. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 527 (1996) (Thomas, J., concurring) (courts have had difficulty in applying the *Central Hudson* balancing test "with any uniformity"); (*City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) ("This very case illustrates the difficulty of drawing bright-lines that will clearly cabin commercial speech in a distinct category. . . . The absence of a categorical definition . . . [is] also a characteristic of our opinions considering the constitutionality of regulations of commercial speech."). Many lower courts have expressly noted their struggle to apply *Central Hudson*. *See e.g., Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, appellate court described this Court's commercial speech cases, concluding that "*Central Hudson* is not easy to apply"); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (recognizing "the difficulty of drawing bright-lines" (quoting *Discovery Network*, 507 U.S. at 419)); *Oxycal Lab., Inc. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) (recognizing "that, often, these definitions will not be helpful and that a broader and more nuanced inquiry will be required"). Moreover, this Court has noted the entreaties of "certain judges, scholars, and amici curiae" to repudiate *Central Hudson* and "implement[] a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

The commercial speech doctrine has become nearly impossible to apply because "commercial speech" is often extremely difficult, if not impossible, to identify. *See* Kozinski, Alex, & Banner, Stuart, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 631 (1990) (Kozinski & Banner). This Court has long recognized that speech can serve dual functions.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen v. California, 403 U.S. 15, 26 (1971). The duality of commercial and noncommercial speech becomes critically important when overlaid with the Court's treatment of false or misleading speech. Traditionally, in the realm of noncommercial speech, the government is restrained from acting as the arbiter of truth and falsity and the state may not punish its citizens for disseminating false noncommercial information. *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . [E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "); *see also First National Bank v. Bellotti*, 435 U.S. 765, 777, 783 (1978) (corporations enjoy the same degree of constitutional protection as individuals for direct comments on public issues; thus, corporate sponsored editorials which address the merits of a pending legislation should not be subject to government regulation of falsity).

The court below, in a groundbreaking decision, held that "*when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." Petitioners' Appendix (Pet. App.) 17a-18a. The court tries to downplay the nature of its holding, claiming that it merely means "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." Pet. App. 2a. There is, of course, nothing to prevent other courts from considering this reasoning persuasive enough to depart from the consumer fraud context to which the court tries to limit it.

Dissenting, Justice Janice Brown took issue with the current commercial speech doctrine that is dependent on speech being categorized as *either* commercial or noncommercial, with little quarter given to speech that contains elements of both. Pet. App. 40a (Brown, J., dissenting). Contemporary marketing, she argues, involves speech far more intermingled than segregated: "With the growth of commercialism, the politicization of commercial interests, and the increasing sophistication of commercial advertising over the past century, the gap between commercial and noncommercial speech is rapidly shrinking." Pet. App. 41a. She further laments, "I believe the commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries." Pet. App. 42a.

The commercial speech doctrine as currently applied by this Court and lower courts can lead to highly unpredictable results, such as the decision below. Pulling a little of this and a little of that from a variety of this Court's opinions, a majority of the California Supreme Court developed a new doctrine unlike any this Court—or any other court—ever articulated. Pet. App. 17a (describing the new "limited purpose" definition

of commercial speech). When the state of the law reaches this point, affected parties have no means by which to adapt their actions or their speech to prevent themselves from running afoul of the law. This uncertainty chills protected speech as those fearing liability shy away from expression that might be construed as "commercial."

The confusion engendered by the opinion below weighs heavily in favor of this Court's review. Stability, certainty, and predictability are valued because they promote confidence in the rule of law and make the resolution of disputes a less costly enterprise. Grodin, Joseph R., *Are Rules Really Better Than Standards*, 45 Hastings L.J. 569, 570 (1994). Certainty achieves fairness to those who rely upon the law, efficiency in following precedent, and continuity and equality in treating similar cases equally. *McGregor Co. v. Heritage*, 631 P.2d 1355, 1366 (Or. 1981) (Peterson, J., concurring). Certainty promotes business innovation and development by letting firms know what they can and cannot do. Further, by eliminating speculation as to what the law is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency for businesses and individuals. Loving, Paul E., *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994).

The decision of the California Supreme Court cannot be reconciled with the First Amendment. It can only serve as authority for other courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker. Petitioners are correct that the decision below is so outlandish that no other court in the country can match it for sheer creativity. *See* Petition for Writ of Certiorari (Pet. Cert.) at 24. But the California Supreme Court is not a backwater tribunal lacking in influence. Not only does the decision impact any business whose speech comes within its borders (which is to say, any national company at the very least), but the decision provides fodder for lawsuits in other states. California

jurisprudence has a deserved reputation for being ahead of the curve.[2] This Court should not let the matter percolate further.

II

THE CURRENT COMMERCIAL SPEECH DOCTRINE ANALYSIS IS INADEQUATE APPLIED TO MARKETERS' INNOVATIVE PRESENTATIONS OF CORPORATE SPEECH

A profit motive, in and of itself, does not render speech unprotected. *Virginia Pharmacy*, 425 U.S. at 761-62. Instead, this Court held in *Virginia Pharmacy* that the speech is reduced to less-favored status only when it does "no more than propose a commercial transaction." *Id.* at 771 n.24. The Court has thus far relied on "common sense" to differentiate between commercial and noncommercial speech. *Id.* The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech and (2) that commercial speech is more durable than other types of speech. *Id., see also Central Hudson*, 447 U.S. at 564, n.6. Both distinctions have been criticized by judges and scholars. *See*,

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[2] For example, in *Foster-Gardner, Inc. v. National Union Fire Ins.* Co., 959 P.2d 265 (Cal. 1998), the California Supreme Court adopted the minority view that insurers do not have a duty to defend administrative agency proceedings. This ruling was then followed by the Ninth Circuit Court of Appeals (*Granite Mgmt. Corp. v. Aetna Cas. & Sur. Co.*, 37 Fed. Appx. 262, 2002 U.S. App. LEXIS 10836 (9th Cir. June 4, 2002)), and the State of Illinois (*W.C. Richards Co. v. Hartford Accident & Indem. Co.*, 724 N.E.2d 63 (Ill. 1999)). *See also*, Rees, Victoria L., *AIDSphobia: Forcing Courts to Face New Areas of Compensation for Fear of a Deadly Disease*, 39 Vill. L. Rev. 241, 249 n.41 (1994), noting that the trend towards recovery for emotional distress without accompanying physical injury began with the California Supreme Court's decision in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). A subsequent case, *Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813 (Cal. 1980), established the California Supreme Court as a trendsetter in this area of recovery.

e.g., Kozinski & Banner, *supra*, at 635-38; Lively, Donald E., *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 296-97 (1987); Post, Robert, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 31-32 (2000). Given that these distinctions no longer appear a solid foundation for diminished constitutional protection, and given the innovative new methods of advertising and marketing in contemporary society, reliance on a "common sense" approach can lead only to confusion.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992), this Court held that even speech that normally receives less First Amendment protection may not be regulated such that the state discriminates on the basis of content or viewpoint. Several lower courts have either applied or considered applying *R.A.V.* to content-based commercial speech restrictions. *See, e.g., Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1331 (9th Cir. 1997) (citing *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (acknowledging potential application of *R.A.V.* to content-based commercial speech regulation)); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *R.A.V.* and *Central Hudson* to speech regulation without deciding which is required); and *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's decision in *R.A.V. []*, that commercial speech must be protected by the usual strictures against content-based restrictions.").

Nonetheless, in *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 68 (1983) (quoting *Central Hudson*, 447 U.S. at 563 n.5), this Court held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" because "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." The Court reiterated this holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626

(1985), in which a state supreme court sanctioned a lawyer for running deceptive newspaper advertisements for his services in bringing personal injury actions related to use of Dalkon Shield contraceptives. Because some of the advertisements contained statements regarding the legal rights of persons injured by the Dalkon Shield, this Court recognized that such statements "in another context, would be fully protected speech." *Id.* at 637 n.7. Nonetheless, this Court concluded that the advertisements were still commercial speech subject to lesser protection under *Central Hudson*. "[A]dvertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* (quoting *Central Hudson*, 447 U.S. at 563 n.5). Based on these cases, the Third Circuit Court of Appeals found that advertisements by rival health care insurance companies that included information about health care insurance and delivery—matters indisputably at the center of public debate—do not escape the commercial speech category. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 937 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990). In each of these cases, the court suppressed noncommercial speech related to important public debates for the sole reason that it was coupled with commercial speech. The patronizing assumption that people cannot discount speech made by someone with an interest in a particular outcome has now led to a California decision in which the corporate side of a public debate is stifled in its entirety. Pet. App. 31a (Chin, J., dissenting) (arguing that Nike's speech is deprived of First Amendment protection only because the company "competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods").

A. Marketing and Advertising Are No Longer Necessarily Identifiable or Separable from Noncommercial Speech

As a corollary to the government's ability to regulate commercial transactions, the government also assumes the ability to regulate commercial speech. *See* Smolla, Rodney A.,

Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech, 71 Tex. L. Rev. 777, 780 (1993). The Court has already conceded that "commercial speech" is not easily defined. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed."); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("[A]mbiguities may exist at the margins of the category of commercial speech."); and *Bolger*, 463 U.S. at 81 (Stevens, J., concurring) ("[T]he impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted.") These "ambiguities" however, threaten to overcome the rest of the category.

The speech in this case involved press releases, letters to the editor, letters to university athletic directors, and the like describing Nike's overseas labor practices. Pet. App. 21a. Far from the prototypical commercial speech of offering to sell X product for Y price, the speech at issue in this case was intended to rehabilitate a corporate image as well as provide information to the public on a matter of broad concern. Extending the lesser protection of the commercial speech doctrine to this type of speech threatens a wide variety of public relations communications. These include:

"Product placement," an arrangement whereby a movie studio incorporates certain commercial products into its film in exchange for cash or free use of the product. Snyder, Steven L., *Note: Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?* 1992 U. Ill. L. Rev. 301 (1992). For example, in 1990, Disney reportedly charged advertisers $20,000 to show the product without comment, $40,000 to show the product and have an actor mention the product's name, and $60,000 for an actor to be shown using the product. *Id.* at 305 (citing *Ad Follies*, Advertising Age, Dec. 24, 1990, at 24).

Product placement began in feature films and television, but other media have followed suit. For example, author Beth Ann Herman featured a Maserati in her novel *Power City*. The protagonist drives a Maserati whose "V-6 engine had two turbochargers, 185 horsepower and got up to 60 in under 7 seconds." *Id.* at 308 (citing Rothenberg, Randall, *Now, Novels Are Turning Promotional*, N.Y. Times, Jan. 13, 1989, at D5). In exchange, a Beverly Hills Maserati dealership threw a $15,000 party for Herman that attracted nationwide television coverage. *Id.* Even record albums are not exempt. Barbara Mandrell's album, *No Nonsense*, was made with the financial support of the No Nonsense panty hose manufacturer. *Id.* at 308 n.67 (citing Epstein, Robert, *Public-Interest Group Tilts at Commercial Windmills*, L.A. Times, June 6, 1991, at F7).

Testimonials became part of main-stream marketing in the 1920s, when Pond's cold cream paid "Great Ladies" (including Mrs. Reginald Vanderbilt and Queen Marie of Rumania) to sing the praises of the moisturizer in exchange for contributions to charity. Madow, Michael, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 164-65 (1993). Lately, however, it may not be apparent that those giving testimony are paid to tout the product. For example, actress Kathleen Turner appeared on CNN in August, 2002, to discuss her struggles with rheumatoid arthritis. She failed to mention that the makers of Enbrel, a drug that battles the condition, paid her to appear. Stafford, Leon/Cox News Service, *Use of 'stealth' marketing raises questions of ethics* (Aug. 29, 2002) (http://www.coxnews.com/newsservice-/stories/2002/0829-STEALTH-ADS-COX.html) (visited Sept. 24, 2002). Similarly, Lauren Bacall appeared on "NBC Today," telling the story of a friend who had gone blind due to macular degeneration and then discussed a new drug that could prevent blindness from that cause. Novartis, the maker of the drug, paid for Ms. Bacall's appearance on the show, a fact revealed to the audience by neither Ms. Bacall nor NBC. Peterson, Melody, *Heartfelt*

Advice, Hefty Fees: Side Effects of Celebrity Drug Pitches Debated, New York Times, Aug. 11, 2002, § 3, at 1.

Music videos also blur the line between commercial and noncommercial speech. *See* Kozinski & Banner, *supra*, at 641. Music itself, of course, is entitled to full First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). A primary function of a music video is to promote the artist and the song, in hopes of persuading consumers to buy the album on which the song appears. Yet whether the video is treated as lesser-protected commercial speech is not obvious under the Court's current jurisprudence. The only court thus far to consider this issue held in *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001), that:

> While music videos are not produced primarily for the sale of the video but, rather, the underlying song, this does not strip them of their First Amendment protection. Music videos are in essence mini-movies that often require the same level of artistic and creative input from the performers, actors, and directors as is required in the making of motion pictures. Moreover, music videos are aired on television not as advertisements but as the main attraction, the airing of which, consequently, is supported by commercial advertisements. Simply put, the commercial nature of music videos does not deprive them of constitutional protection.

(Footnote omitted.) This holding provoked a dissent that seems equally plausible:

> A music video stands to an album the same way that a movie "trailer" or "teaser" stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are "doubly" commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the videos that they believe will generate the highest advertising revenue. The video channels' unwillingness to broadcast controversial materials—materials likely to spook boycott-wary advertisers—provide additional evidence of the essentially commercial nature of the undertaking.

Id. at 533 (Keller, J., dissenting). The disagreement between the majority and dissent in *Montgomery* is significant only because the categorization of the video impacts the level of protection to which it is entitled under the First Amendment.

"Virtual advertising" is a form of digital technology that allows advertisers to insert computer-generated brand names, logos, or animated images into previously recorded television programs or movies. Deutsch, Askan, *Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition*, 11 Marq. Sports L. Rev. 41, 42 (2000). It uses computers to place still or video images into live video broadcasts in real time so that they look as if they are part of the original scene. For example, several Major League Baseball teams have made use of virtual advertisements along the wall behind home plate. *Id.* (citing Elliott, Stuart, *Real or Virtual? You Call It*, New York Times, Oct. 1, 1999, at C1). Virtual advertising blurs the line between television programming and commercials. *Id.* at 44.

"Stealth" or "guerilla" marketing is a new way of using undercover actors to promote a product without the public being aware that the actors are paid by the product's manufacturer. For example, the United States arm of Sony Ericsson Mobile Communications Ltd. hired men and women to pose as tourists at tourist attractions in New York City, then ask passers by to take their picture with Sony's new phone/digital camera. Sony also hired attractive women to sit at opposite ends of a bar in a nightclub and play a computer game on their phones while engaging other patrons in conversation about their cool new toy. Under no circumstances are the actors supposed to tell the passers by or club patrons that they are employed by Sony. Vranica, Suzanne, *Advertising:*

That Guy Showing off His Hot New Phone May Be a Shill, Wall St. J., July 31, 2002, at B1. Moreover, the actors do not make any type of sales pitch, they simply demonstrate the product and make flattering comments about it. *Id.* Similarly, the public relations firm representing a new flavored-water brand dispatched young women fitting the target demographic to trendy Manhattan bars and clubs to be seen drinking the specific brand and making favorable comments about it to unsuspecting bar patrons. Harrelson, Michael, *The Fat Man Sings: Meet the 300-Pound Guerrilla of Undercover Marketing*, Nightclub & Bar Magazine (Feb. 2002) (http://www.nightclub.com/magazine-/February02/cover.html) (visited Sept. 24, 2002) (profiling Jonathan Ressler, CEO of Big Fat, Inc., a public relations firm that is at the vanguard of undercover marketing techniques). *See also* Goldberg, Michelle, *Confessions of an Undercover Drink Fink*, Salon (Dec. 9, 1997) (http://www.salon.com/media-/1997/12/09media.html) (visited Sept. 28, 2002) (first-hand account of methods used to sell cognac martinis without expressly offering to conduct a commercial transaction).

This type of marketing is not restricted to high-tech gadgets and liquor. Record companies may plant attractive young women in record shops, paid to notice the album in a customer's hand and helpfully suggest other artists the customer may like. Nord, Thomas, *Stealth marketing—is it the next big thing or just a big fat flop?*, The Courier-Journal (Louisville, KY) (August 3, 2001) (http://www.courier-journal.com/features/columns/popculture/fe20010803pop.html) (visited Sept. 24, 2002). Scooter companies pay college students to hang outside coffee shops, striking up conversations with customers and casually mentioning their new rides. Khermouch, Gerry & Green, Jeff, *Buzz Marketing*, Business Week, July 30, 2001, at 54. Children are given copies of hot new portable video games, urging them to bring it to class and show all their friends. *Id.* at 55.

Providing helpful advice (while selling a little something on the side) is also a time-honored method of marketing that is

evolving into a particularly powerful tool on the Internet. Using this method, an entrepreneur seeks out chat groups on the Internet that discuss issues related to what he has to sell. For example, someone who wants to sell bookkeeping software will find (e.g., through Yahoogroups) groups of people who talk about finances. He will "lurk" long enough to get a feel for the group's discussions, and then start contributing. He will spend the bulk of his time joining in the discussion and some percentage correctly answering questions related to his product. Each of his posts will link to his own webpage where he offers software for sale. After becoming a trusted member of the group, he will find occasional opportunities to suggest a "meeting" via private E-mail to discuss how the software can meet a particular person's special needs. Tincher, Rex, *Stealth Marketing in Usenet News Groups* (http://216.239.53.100/search?q=cache:pra0aYbfAtwC:www.dnaco.net/~tinc/stealth.htm+stealth+marketing+usenet&hl=en&ie=UTF-8) (visited Oct. 24, 2002).

Another common incarnation of this technique is found on websites geared toward parents, mothers in particular. Baby food manufacturers have websites chock full of helpful information as to when baby should achieve developmental milestones, advice on how to encourage baby to eat new foods, health advice for the expectant and breastfeeding mother, and so on. Some even have a doctor on staff to answer E-mail inquiries. Of course, the websites also provide information for purchasing products, but one may peruse the sites at length without ever making a purchase. *See, e.g.*, Website for Gerber products, http://www.gerber.com/main.asp (visited Oct. 29, 2002) (home page points readers to information about nutritional development, new products, and "expert advice, anytime, day or night"); and Website for Evenflo products, http://www.evenflo.com/yb/index.phtml (visited Oct. 29, 2002) (pregnancy tips, introducing solids, better bottlefeeding and factors to consider when purchasing a breast pump).

Websites as commercial speech have not yet generated much case law,[3] but, especially as regards lawyer advertising, they have generated some law review articles concerned about whether law firms' websites are subject to state rules regarding solicitation. *See, e.g.*, Kershen, Drew L., *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 Drake J. Agric. L. 141, 145 (1999). (Even if a website is primarily informational, if the content suggests a solicitation for a commercial relationship, the website is commercial speech subject to state regulation.").

B. Speech Intended to Bolster a Corporate Image Should Be Fully Protected Under the First Amendment

Corporate image advertising "describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation." Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess. 1149, 1156 (1978), *quoted in* Lin, C.C. Laura, *Note: Corporate Image Advertising and the First Amendment*, 61 S. Cal. L. Rev. 459, 461 (1988). There are, generally, two types of image advertising. The first is advertising that treats the company itself as a product to be sold. For example, lumber giant

[3] *See e.g., Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 505 (5th Cir. 2001) (court rejected Ford's challenge to a Texas law prohibiting the sale of used vehicles via a website as violating its First Amendment right to speech); *Planned Parenthood Fed'n of America, Inc. v. Bucci*, 1997 U.S. Dist. LEXIS 3338, *6-*12 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 1998 U.S. App. LEXIS 22179 (2d Cir. Feb. 9, 1998), *cert. denied*, 525 U.S. 834 (1998) (defendant, doing business as Catholic Radio, registered a website at "plannedparenthood.com." dedicated to the pro-life position; court held that this use of plaintiff's mark was commercial speech because it impacted the plaintiff's ability to offer its own services over the Internet and because the very use of the Internet is "in commerce" because it requires long-distance, interstate phone lines to connect).

Weyerhaueser has been reviled by environmentalists for clear-cutting certain forest areas. *See, e.g.*, Binole, Gina, *After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting*, Portland Bus. J. (June 28, 1999) (http://forests.org/archive/canada-/weywonts.htm) (visited Oct. 24, 2002). Promoting its image as a responsible steward of the earth, Weyerhauser publicized its partnership with CARE, a well-known international relief and development organization. Together, they will teach "sustainable forestry practices and environmental stewardship to improve living conditions of people in developing countries for current and future generations." *See* http://www.weyerhaeuser.com/ citizenship-/philanthropy/partnershipwithcare.asp (visited Oct. 24, 2002).

This type of image advertising also includes companies that project an ethos of social responsibility and a political philosophy that consumers presumably can share and support through the purchase of the companies' products. For example, The Body Shop sells cosmetics and one might reasonably presume that its communications with the public are intended to sell soap and moisturizers. The company's owner contends that the central mission of business is to improve the world by not only caring for its work force and customers, but also for its communities and the environment. She believes that business should be a force for social good first, and consider bottom line profits second. Hartman, Cathy L. & Beck-Dudley, Caryn L., *Marketing Strategies and the Search for Virtue: A Case Analysis of The Body Shop, International*, 20 J. of Bus. Ethics 249-63 (1999). Thus, The Body Shop's mission statement

> specifies that social, environmental, and political values are the fundamental bases of exchange with its constituents. Specifically, the company's first commitment is to "social and environmental change," and, second, to the "financial and human needs" of its stakeholders. Further, its product pledge involves "the protection of the environment, human and civil rights" within the cosmetics industry.

Id. Whether it is Weyerhaeuser's forest management or the Body Shop's focus on "natural" skin care reflecting broader environmental concerns, these businesses are speaking on relevant issues that do not come close to asking consumers to buy their products.

The second type of image advertising takes positions on public issues. As such, it is even further removed from actual commercial transactions than advertising to promote the company itself as a product. For example, when inexpensive Japanese compact cars began to flood the market, American automakers responded by urging consumers to "buy American." When the president of an American automobile company takes out an advertisement in a newspaper or buys air time on a network to urge people to "buy American," he may argue that by purchasing foreign automobiles Americans are putting other Americans out of work and that buying his company's cars is a patriotic act. The speech is profit motivated; it even proposes a commercial transaction and directly concerns the economic interests of the speaker. However, it also touches on matters of pressing political concern—consumer choice, protectionism, and free trade. Emord, Jonathan W., *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991). "Information about the quality and price of some products may relate to important political issues. For example, a belief that American cars are over priced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly . . . ." *Id.* (quoting Farber, Daniel, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382 (1979)).

In *Quinn v. Aetna Life & Casualty Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (1978), a state court trial judge ruled that an insurance company's advertisements blaming high insurance premiums on large tort damage awards were commercial speech and, thus, could be enjoined if found to be false or misleading. Plaintiffs involved in on-going personal injury actions sought to enjoin Aetna from continuing publication of statements in

certain magazines that criticized the tort system and what Aetna perceived to be excessive damages awarded in many personal injury cases on the grounds that the advertisements contained misleading statements violating New York law. *Id.* at 549, 409 N.Y.S.2d at 475. Aetna responded that its publications advocating tort law reform were political expression and fully protected by the First Amendment. *Id.* The state judge ruled that the statements were commercial speech that could be enjoined if false or misleading. *See id.* at 553-54, 409 N.Y.S.2d at 478. The court made its ruling despite Aetna's purpose to influence potential jurors to give lower damage awards, rather than targeting its statement at consumers who might purchase insurance products. *Id.* at 554, 409 N.Y.S.2d at 478. When the case was removed to federal district court, *Quinn v. Aetna Life & Casualty Co.*, 482 F. Supp. 22, 29 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) (per curiam), the district court judge concluded that the advertisements were not commercial speech, *id.*, and the Second Circuit affirmed. *Quinn*, 616 F.2d at 40. The federal district judge concluded that the state court judge had "engaged in a fundamental misconception by calling the advertisements here in question 'commercial speech.'" *Quinn*, 482 F. Supp. at 29; *see also Rutledge v. Liability Ins. Indus.*, 487 F. Supp. 5, 8-9 (W.D. La. 1979).

The pharmaceutical industry has also sponsored political advertisements—"issue ads"—that praise certain candidates' stands on prescription drug legislation. The advertisements are prepared and placed by a nonpartisan group called United Seniors Association, but that group is funded largely by unrestricted educational grants from the Pharmaceutical Research and Manufacturers of America (PhRMA). Edsall, Thomas B., *Drug Industry Financing Fuels Pro-GOP TV Spots*, Washington Post, Oct. 23, 2002, at A11. The drug companies that are members of PhRMA undoubtedly would benefit economically if the positions they are advertising are enacted into law. Under the California Supreme Court's analysis, this core political speech could be transformed into commercial speech entitled to lesser protection.

This Court's current commercial speech jurisprudence simply is not up to the task of analyzing corporations' innovative ways of informing the public of their positions on issues ranging from the companies themselves to raging public debates. The California Supreme Court's decision demonstrates how far afield a court can go while relying on this Court's precedents.

CONCLUSION

"One of the most delicate tasks a court faces is the application of the legislative mandate of a prior generation to novel circumstances created by a culture grown more complex." *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 273 (2d Cir. 1981). The current doctrinal framework is ill suited to handle the wide range of commercial and mixed commercial/noncommercial speech present in the market today. The decision below represents a distillation of this Court's commercial jurisprudence *reductio ad absurdem*: in its efforts to prevent consumers from hearing misleading corporate speech, the California Supreme Court has essentially outlawed *all* corporate speech. The petition for a writ of certiorari to the California Supreme Court should be granted.

DATED: November, 2002.

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MOTION FILED
NOV 15 2002

(4)

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* ON BEHALF OF THE COUNCIL OF PUBLIC RELATIONS FIRMS, THE ARTHUR W. PAGE SOCIETY, THE PUBLIC RELATIONS SOCIETY OF AMERICA, THE PUBLIC AFFAIRS COUNCIL AND THE INSTITUTE FOR PUBLIC RELATIONS IN SUPPORT OF GRANTING A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Council of Public Relations Firms, the Arthur W. Page Society, the Public Relations Society of America, the Public Affairs Council and the Institute for Public Relations, through their undersigned counsel, hereby respectfully move for leave to file the following brief *amicus curiae* in this case. The petitioners have filed with the Court a letter consenting to filing of all *amicus* briefs in support of either party. Respondents have refused to consent.

Because this brief would materially assist this Court in its consideration of the petition for a writ of certiorari, *amici* respectfully request leave to file the attached brief.

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Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)	17
Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986)	17
R.A.V. v. St. Paul, 505 U.S. 377 (1992)	10
Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)	11
In re RMJ, 455 U.S. 191 (1982)	18
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)	18
United States Constitution:	
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Cited Authorities

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Federal Statute:	
Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204 (2002)	8
State Statutes:	
CAL. BUS. & PROF. CODE § 17200 *et seq*	7
CAL. BUS. & PROF. CODE § 17500 *et seq*	7
Other Authorities:	
AEI Conference on Productivity & the American Economy – Part 1 (C-Span television broadcast, October 23, 2002)	4
EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS (1999)	8
Columbia's School of International and Public Affairs Course Catalog, INAF U9178.001 "Human Rights and Corporate Responsibility"	8
5 Die After Taking Tylenol Believed to Contain Cyanide, NEW YORK TIMES, Sept. 30, 1982	12
Bonnie Harris, *In Fast Food, Some See Fast Track*, LOS ANGELES TIMES, Mar. 12, 2001	10
Harvard's John F. Kennedy School of Government Course Catalog, KSG BGP-232 "Business as a Political Actor"	8

Cited Authorities

	Page
Gregg Hillyer, *Monsanto Makeover*, PROGRESSIVE FARMER, Feb. 2002	14
http://www.awpage.com/public/about/apabout/html (last visited Nov. 11, 2002)	3
http://www.bp.com/centres/press/hornchurch/media_resources/press_release/index.asp (last visited Nov. 11, 2002)	6
Interview by PBS Frontline with Hugh Grant, CEO of Monsanto, (Dec. 2000), *at* http://www.pbs.org/wgbh/harvest/interviews/grant.html (last visited Nov. 11, 2002).	13, 14, 15
Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 Bus. Law. 757	12
Let Nike Speak for Itself, USA TODAY, Oct. 14, 2002	7
Tamar Lewin, *Tylenol Posts an Apparent Recovery*, NEW YORK TIMES, Dec. 25, 1982	12
MacNeil/Lehrer Report: Cyanide Investigation (PBS television broadcast, Oct. 1, 1982)	12
Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, SAN FRANCISCO CHRONICLE, Oct. 15, 2002	10

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McDonald's Social Responsibility Report, available *at* http://www.mcdonalds.com/corporate/social/report/index.html (last visited Nov. 11, 2002)	11
Monsanto Company 2001 Annual Report, available *at* http://www.monsanto.com.	14
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Pharmaceutical Innovation: the enabling conditions, *at* http://www.merck.com/overview/98ar/p6.htm (last visited Nov. 11, 2002) 6

Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PLI/Corp 307 13

Precious Cargo, available *at* http://gm.com/company/gmability/safety/child_passenger_safety/precious_cargo/index.html (last visited Nov. 11, 2002) 5

Milford Prewitt, *Critics Slam Best-Seller Critique of QSR*, NATION'S RESTAURANT NEWS, Jun. 11, 2001 9

Speech by James Robbins, President and CEO, Cox Communications (C-Span television broadcast, October 22, 2002) 4

ERIC SCHLOSSER, FAST FOOD NATION (2001) 9

Regina Schrambling, *Catching America With Its Hands in the Fries*, NEW YORK TIMES, Mar. 21, 2001 10

Michael Specter, *The Pharmageddon Riddle*, THE NEW YORKER, April 10, 2000 ..... 13, 14

Therapeutic Cloning Under Fire *at* http://www.lef.org/magazine/mag2002/mar2002_cover_west_01.html (Mar. 2002) 15

INTERESTS OF THE *AMICI CURIAE* [1]

The Council of Public Relations Firms represents the business of public relations and corporate communications. Its 120 member firms include all of the ten largest firms and over three quarters of the top 50 firms (measured by revenue) in the world. Together, *amici* and its members represent every facet of the public relations and corporate communications industry. The mission of the Council of Public Relations Firms is to build the business of public relations and corporate communications by advocating to business professionals the value of public relations as a strategic business tool, promoting the benefits of careers in public relations to prospective employees and assisting members and their clients in setting the standards for the profession.

The Arthur W. Page Society, founded in 1983, is a professional organization with approximately 300 members consisting of chief corporate public relations officers of major companies, as well as other leaders in the public relations profession who are closely related to corporate public relations. Its goals are to strengthen the management policy role of the corporate public relations officer; develop knowledge of corporate management issues; educate the public about the role of public relations management; encourage research that leads to improvement in the corporate public relations function and to introduce these concepts to scholars, teachers and students.

The Public Relations Society of America is the world's largest organization for public relations professionals. Its nearly 20,000 members, organized into 117 chapters, represent business and industry, technology, counseling firms, government, associations, hospitals, schools, professional services firms and nonprofit organizations. Chartered in 1947, its primary objectives are to advance the standards of the public relations profession and to provide members with professional development opportunities through continuing education

1. Counsel for the *Amici* were the sole authors of this brief. No person or entity other than *Amici* made a financial contribution to this brief.

programs, information exchange forums and research projects conducted on the national and local levels.

Formed in 1954 at the urging of President Dwight D. Eisenhower, the Public Affairs Council is one of the leading associations for public affairs professionals. It provides unique information, training and other resources to its members to support their effective participation in government, community and public relations activities at all levels. Nearly 600 member corporations, associations and consulting firms work together to enhance the value and professionalism of the public affairs practice, and to provide thoughtful leadership as corporate citizens.

The Institute for Public Relations, established in 1956 by a senior group of public relations professionals, is devoted to advancing the professional knowledge and practice of public relations through research and education. It has supported more than 200 research projects, ranging from what students of public relations must study in order to understand the profession to how new technologies affect the public relations profession, as well as sponsored numerous competitions and awards to reward excellence in the field.

Amici are in the business of advising and assisting corporations regarding public communications. *Amici* assist companies of all types to gather and disseminate information related to their businesses and communities on all conceivable topics, from investor relations, to philanthropic and community outreach programs, to corporate crisis communications. For decades, *amici* have relied on the First Amendment protections available to all speakers, regardless of their identity, to engage in robust public debate about issues of public concern free from the risk of strike suits. This protection has become even more vital over the last several decades, because, as Arthur Page[2] put it, it has become increasingly true in our information

2. Arthur Page, who was the first chief corporate communications officer to sit on the board of directors of a major U.S. corporation (Cont'd)

age that "all business in a democratic country begins with public permission and exists by public approval." http://www.awpage.com/public/about/apabout/html (last visited Nov. 11, 2002). Because the California Supreme Court's decision will have an unfair, unprecedented and materially chilling impact on the ability of companies and *amici* to speak on issues of public concern, *amici* urge the Court to grant certiorari and decide this matter on the merits.

INTRODUCTION

Amici support Nike's argument that the California Supreme Court's holding that Nike's responses to allegations that it engaged in unfair labor practices abroad amount to commercial speech conflicts with this Court's precedents. *Amici* submit this brief to make the Court aware of the importance of the decision below and the way it has chilled, and will continue to chill, vigorous debate on a wide range of public issues.

SUMMARY OF ARGUMENT

The California Supreme Court incorrectly held that claims asserted under California's unfair competition and false advertising laws on the basis of letters to the editor, press releases and other corporate communications may, consistent with the First Amendment, give rise to strict liability. It based this conclusion on its *sui generis*, three-part definition that "commercial speech" is any "representation[] of fact": (1) made by "commercial" speakers "engaged in commerce"; (2) to an audience that may include potential purchasers or that may report on the issue to potential consumers; (3) about a topic related to "business operations." *Kasky v. Nike, Inc.*, 45 P.3d 243, 247, 256 (Cal. 2002).

This is a test of astonishing breadth that, because it expressly singles out factual representations, amounts to an Orwellian

(Cont'd)
(AT&T), is credited with having established the profession of corporate communications.

preference for debate without the benefit of facts. That cannot be squared with the First Amendment because this new test sweeps within its scope ***any*** factual statement, including letters to the editor and opinion editorials; statements published on web sites; media presentations; press releases; television appearances; appearances on the Newshour with Jim Lehrer[3]; C-Span appearances[4]; indeed, ***any*** public statement made by a company about a topic related to what that company does. As a result, the press as a whole—from a newspaper's business section to CNN's Lou Dobbs and CNBC—will suffer a dearth of information because silence will become the prudent course of action for business executives and spokesmen.

This will result in the compelled self-censorship of an enormous amount of protected speech on important matters of

3. *See, e.g.*, *Newshour with Jim Lehrer: Newsmaker: Phillip Knight* (PBS television broadcast, May 13, 1998) (Phillip Knight, CEO of Nike, discussing Nike and globalization); *Newshour with Jim Lehrer: Return of Thalidomide* (PBS television broadcast, August 4, 1998) (John Jackson, CEO of Celgene, on the FDA's decision to give limited approval to Thalidomide, and Celgene's possible marketing of the drug); *Newshour with Jim Lehrer: Bridging the Gap* (PBS television broadcast, March 20, 1996) (Aaron Feurstein, CEO of Malden Mills, discussing corporate responsibility and the wage-profit gap; using examples from Malden Mills); *Newshour with Jim Lehrer: Megamerger Masters* (PBS television broadcast, January 12, 2000) (Steve Case, CEO of America Online, and Gerald Levin, CEO of Time Warner, discussing the impending AOL Time Warner merger and how the consolidation was in the public interest).

4. *See, e.g.*, Leo Mullin, Delta Airlines, Chairman & CEO (C-Span television broadcast, September 25, 2002) (Mr. Mullin discussed the financial well-being of the airline industry and what must be changed in order for airlines to survive); Speech by James Robbins, President and CEO, Cox Communications (C-Span television broadcast, October 22, 2002) (discussing the cable industry); AEI Conference on Productivity & the American Economy—Part 1 (C-Span television broadcast, October 23, 2002) (a panel discussion on the economy including Dick Davidson, Chairman & CEO, Union Pacific Corporation; Marilyn Carlson Nelson, Chairman & CEO, Carlson Company).

public concern because the issues also happen to touch upon the speaker's "business operations":

- Johnson & Johnson's swift public response to Tylenol cyanide tampering in 1982 would, under *Kasky*, expose it to strike suits, *see* pp. 11-13, *infra*;
- McDonald's would no longer respond to its critics, such as Eric Schlosser and his book FAST FOOD NATION, *see* pp. 9-11, *infra*;
- Monsanto and other companies would no longer add their perspective to the debate regarding crop modification, *see* pp. 13-15 *infra*;
- Advanced Cell Technology and other companies would risk suit by entering the public debate on cloning, *see* p. 15, *infra*;
- General Motors and other companies would no longer comment on the pros and cons of airbags for child safety.[5]
- Technology companies would no longer comment on the need for "green card" quota increases to bring specialists into the United States.[6]

5. *See, e.g.*, Precious Cargo, available *at* http://gm.com/company/gmability/safety/child_passenger_safety/precious_cargo/index.html (last visited Nov. 11, 2002) ("Another reason to restrain children properly, in a rear seat, is the vehicle's frontal air bags, which are designed to restrain adults. Air bags have to inflate very quickly, faster than a person can blink an eye, and with great force. Serious injury, and even death, can result for anyone—especially a child—who is up against, or close to, a frontal air bag when it inflates.").

6. *See, e.g.*, *Newshour with Jim Lehrer: High-Tech Workers* (PBS television broadcast, Apr. 3, 1998) (T.J. Rodgers, CEO of Cypress Semiconductor, stating "We hire all the Americans we can get" but that green cards still needed for foreign engineers and specialists because there are not enough American engineers to keep pace with the demand for expansion. Rodgers also stated: "I promise that every time I get one of those engineers I will create five more jobs right here in America for Americans to build and sell those products").

- Drug and biotech companies would no longer comment on the effect of the Food and Drug Administration approvals process on the flow of their new products to the market.[7]
- British Petroleum would no longer claim that its solar and wind powered service station was "the world's most environmentally friendly service station" for fear that because it sells gasoline, it would not be deemed sufficiently sensitive to the environment for activist groups.[8]

This list is by no means exhaustive of the potential ill effects of the California Supreme Court's new take on the First Amendment. Because the *Kasky* test covers any utterance where consumers might be present or might be expected to receive the information through media outlets, corporate speech will disappear from every medium of communication with the public.

This new and sweeping test, when coupled with the concededly broad scope of California's unfair competition and false advertising law, will reverberate far beyond California's borders. The *Kasky* test applies to speech made outside of the state whenever the speech is reported—by third parties, the press, or otherwise—in-state. *See Kasky*, 45 P.3d at 256 (liability attaches even when speech directed to "reporters or reviewers" who repeat the message to potential buyers). Other aspects of California's broad unfair competition and false advertising law virtually guarantee that companies doing business in California—and their agents—will face potentially costly strike suits. California law allows any citizen, without even a showing

7. *See, e.g.*, *Pharmaceutical Innovation: the enabling conditions*, *at* http://www.merck.com/overview/98ar/p6.htm (last visited Nov. 11, 2002) ("It is critical that the U.S. Food and Drug Administration approve safe and effective new medicines in a timely fashion, so that people who need them will get them as quickly as possible").

8. *See* http://www.bp.com/centres/press/hornchurch media_resources/press_release /index.asp (last visited Nov. 11, 2002) (describing its service station in Hornchurch, England as "the world's most environmentally friendly service station").

of reliance or deception, to bring "private attorney general" actions for restitution and injunctive relief. The challenged statement need not even be false as long as consumers are "misled" by it. CAL. BUS. & PROF. CODE § 17200 *et seq.* and *id.*, § 17500 *et seq.* The remedies available to these "private attorneys general"—making restitution to consumers and a Court-ordered "corrective" speech campaign—further chill protected speech.

All of this strikes *amici* particularly hard. As a *USA Today* editorial reported, "if the Kasky reasoning stands, then the public-relations industry . . . might as well shut down." *Let Nike Speak for Itself*, USA TODAY, Oct. 14, 2002. As troubling as the *Kasky* decision may be for advertisers and advertising agencies, at least there is a well-developed body of law (federal and state) that provides guidance regarding when advertising is false and subject to litigation. No such rules exist for the corporate speech that *amici* help create and disseminate because, prior to the California Supreme Court's decision, that speech correctly was considered to be fully protected, core speech regarding matters of public concern. This makes it difficult, if not altogether impossible, for *amici* and their clients to anticipate where the California courts will draw the line between "misleading" and non-actionable statements.

The *Kasky* decision inevitably will stymie public relations professionals' ability to assist corporations maintain an open dialogue with the public and engage in the "uninhibited, robust and wide-open" public debate that was previously thought to be protected by the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). This Court should issue a writ of certiorari and reverse the California Supreme Court's erroneous decision.

ARGUMENT

I. FACTUAL CORPORATE COMMUNICATIONS ARE A VITAL COMPONENT OF UNFETTERED DEBATE ON MATTERS OF PUBLIC CONCERN

Corporate speech is vitally important to a functioning democracy. As corporations and the communities in which they reside have become more closely linked over the past two decades, the public has come to expect a new level of civic engagement from corporations. *See* EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS xiv (1999) ("The public environment in which companies operate today . . . is far different than it was just 20 years ago. There are dramatic and far-reaching changes in the expectations of communities and societies today that define and influence how a company can operate"). Public relations professionals facilitate this interaction between the public and companies by providing factual information on topics of interest to both groups. Indeed, the public has made clear that its preference is for more openness and communication from companies, not less. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (instituting several measures designed to increase corporate transparency).

Just as with other participants in public affairs, corporate speech and advocacy plays a significant role in informing public debate and shaping public opinion and policy. As a result, government school curricula recognize the increased role (and expectations) of business in American democracy. *See* Harvard's John F. Kennedy School of Government Course Catalog, KSG BGP-232 "Business as a Political Actor" (describing course designed to analyze the important role that "[b]usinesses play . . . in the public policy processes of capitalist democracies"); *see also* Columbia's School of International and Public Affairs Course Catalog, INAF U9178.001 "Human Rights and Corporate Responsibility" (describing course

designed to analyze the "complex questions arising out of the interaction of business activities and human rights . . . ").

II. PUBLIC RELATIONS CAMPAIGNS THAT MAKE IMPORTANT CONTRIBUTIONS TO PUBLIC DEBATES WILL BE CHILLED BY *KASKY*

For decades, corporate and non-corporate speech on the same topics have appeared together in all of the media traditionally associated with First Amendment purposes: (a) editorials and letters to the editor, (b) paid-for advertised editorials in newspapers, magazines, and other publications, and (c) appearances on news shows and at other public forums. Often, as is the case here, corporations speak in response to speech critical of them. That critical speech, whether by design or because of lack of access or resources fully to research the issue, often leaves out important facts vital to a comprehensive presentation of the issues involved.

For example, in 2001, Eric Schlosser released FAST FOOD NATION, a best-selling social-cultural critique of the fast food industry. The book criticized several aspects of the fast food industry, such as: its contribution to low-wage, unskilled jobs; its role in the dramatic increase in rates of obesity; and, its role in the homogenization of American neighborhoods. *See* Eric Schlosser, FAST FOOD NATION 3-10 (2001). Although the book criticized the industry as a whole, it focused in large part on the practices at McDonald's. Faced with a damning critique of all facets of its business, McDonald's vigorously argued the book provided an incomplete picture. *See, e.g*, Milford Prewitt, *Critics Slam Best-Seller Critique of QSR*, NATION'S RESTAURANT NEWS, Jun. 11, 2001, at 4 ("The real McDonald's bears no resemblance to anything described in that book. The author is wrong about our people, wrong about our jobs and wrong about our food. He also completely ignores our values, which is not surprising since he never contacted us for any information whatsoever"). Other reviewers also questioned the accuracy of the account.

See Regina Schrambling, *Catching America With Its Hands in the Fries*, NEW YORK TIMES, Mar. 21, 2001, at F1 ("Some reviewers have accused Mr. Schlosser . . . of playing fast and loose with the facts").

In order to fill-in the gaps that it felt were missing, McDonald's engaged in the traditional response — counter speech of its own — to present a fuller account of its business. *See, e.g.*, Bonnie Harris, *In Fast Food, Some See Fast Track*, LOS ANGELES TIMES, Mar. 12, 2001, at C1 (describing how many Latinos view McDonald's and other restaurant chains as a key to long-term financial security, and quoting McDonald's spokesman Walt Riker as stating, "We've always disputed the idea that fast-food jobs are dead-end jobs, and our Hispanic workers are evidence of that. We value their work, and we're continuing to encourage their advancement through training and other programs"); *see also* Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, SAN FRANCISCO CHRONICLE, Oct. 15, 2002, at A1 (in response to criticisms that McDonald's encourages obesity, McDonald's spokeswoman pointed out that it was the first major fast food restaurant to introduce salads and reduce the fat content of its products).

Until the California Supreme Court's decision, a corporation like McDonald's right to defend itself and its shareholders from criticism and to present a complete record was grounded on the same unfettered First Amendment protection that the critic enjoyed. In granting critics First Amendment protection in attacking a company while simultaneously denying that same protection to the company in responding to those allegations, the *Kasky* decision impermissibly favors speech from a particular viewpoint. *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Indeed, McDonald's response to FAST FOOD NATION dramatically illustrates the unworkability of the *Kasky* test; literally every statement McDonald's made in response—no matter what the issue—concerned its "business operations," because that is

precisely what the book attacked.[9] Under the *Kasky* regime, however, McDonald's would be forced to make the Hobson's choice of either staying silent in the face of this criticism, or risking a potential suit for defending itself publicly.

The *Kasky* decision also creates a false dichotomy between fact and opinion and suggests that corporate statements on issues of public concern can receive First Amendment protection only if they are pure ***opinion***. This false dichotomy between fact and opinion makes the decision even more unworkable. *See, e.g.*, *Board of Trustees v. Fox*, 492 U.S. 469 (1989); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). This element of the *Kasky* decision strikes at the heart of *amici's* business because companies look to *amici* to maintain open lines of communication with the public. *Amici* assist in researching fully the facts surrounding a given issue and design strategies efficiently to deliver this information to the public. The importance of this free flow of information cannot be overstated.

It is difficult to think of a more stark example of the public benefits that can flow from the free flow of corporate speech than Johnson & Johnson's response to the Tylenol cyanide crisis. In the fall of 1982, seven people who had taken Tylenol died from cyanide contained in the capsules. In the hours following the first news of the crisis, Johnson & Johnson made the crucial decision to communicate everything it knew to the public. As George Frazza, Johnson & Johnson's General Counsel at the time, stated: "[w]e decided we were going to communicate, to be active . . . We were determined to find out what the facts were, and whether we liked them or not, communicate them

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9. In responding to the concerns raised by FAST FOOD NATION, McDonald's has made numerous factual statements concerning its "business operations." *See, e.g.*, McDonald's Social Responsibility Report, available *at* http://www.mcdonalds.com/corporate/social/report/index.html (last visited Nov. 11, 2002) ("Employees are respected and valued"; "Employees receive work experience that teaches skills and values that last a lifetime"; "Pay is at or above local rate in marketplace").

without gloss to all of our constituencies." *See* Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 BUS. LAW. 757, 767 (1984). As a result, Johnson & Johnson maintained an open dialogue with the press and public throughout the crisis. *See, e.g., 5 Die After Taking Tylenol Believed to Contain Cyanide*, NEW YORK TIMES, Sept. 30, 1982 at A12 (Lawrence Foster, a Johnson & Johnson spokesman, describing what information had been learned from authorities and Johnson & Johnson's method of distribution); *see also MacNeil/Lehrer Report: Cyanide Investigation* (PBS television broadcast, Oct. 1, 1982) (Dr. T.N. Gates, medical director of Tylenol, appearing as one of the guests and discussing the manufacturing and distribution of Tylenol in the context of the cyanide crisis).

Johnson & Johnson's forthrightness with the public not only saved the Tylenol brand and perhaps even Johnson & Johnson itself, it contributed to the way American consumer goods are packaged and labeled to be tamper-resistant. *See* Tamar Lewin, *Tylenol Posts an Apparent Recovery*, NEW YORK TIMES, Dec. 25, 1982 at A30 (quoting a market researcher's conclusion that Johnson & Johnson's recovery due to "forthright manner" in dealing with the public during the Tylenol crisis). *Kasky*'s regime of strict liability, however, would inhibit this open communication. Under *Kasky*, if a company makes a broad statement or unintentionally publishes incorrect information concerning its distribution practice (undeniably part of its "business operations"), the prescribed corrective action is so punitive that it may dissuade companies from communicating in the first place.[10] The harsh results of suppressing this openness

10. During the cyanide crisis, Johnson & Johnson made many statements about its "business operations" that would potentially be a basis for liability under *Kasky*. *See, e.g., McNeil/Lehrer Report: Cyanide Investigation* (Dr. Gates' comments that "We are confident . . . that our security, our quality assurance procedures are such that this could not (Cont'd)

are difficult to overstate: Johnson & Johnson's swift public communications literally are credited with saving human life. Of the eight million capsules recalled after Johnson & Johnson began its campaign, seventy-five were found to contain cyanide. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PLI/Corp 307, 309.

Debates on some of the most important issues of our time have been shaped and influenced by corporate speakers and public relations professionals such as *amici*. To illustrate the importance of corporate speech, and without purporting to be exhaustive, *amici* provide the following additional examples of campaigns that would be chilled, if not squelched altogether, under the *Kasky* regime.

In the last several decades, advances in biochemistry and genetics have created the ability to modify crops genetically. A wide-ranging debate regarding the wisdom of genetic engineering has taken place in the press, in academic circles and in Congress. *See* Michael Specter, *The Pharmageddon Riddle*, THE NEW YORKER, April 10, 2000 (describing the worldwide debate over biotechnology in agriculture). Among other things, critics of the practice argue that genetically modified agriculture, or "Franken-food," will have environmental consequences—such as gene migration and the build-up of resistance to insecticides. *See* Interview by PBS Frontline with Hugh Grant, CEO of Monsanto, (Dec. 2000), *at* http://www.pbs.org/wgbh/harvest/interviews/grant.html (last visited Nov. 11, 2002).

(Cont'd)
have happened in the process of the packaging—manufacture and packaging of the product"; "We do have cyanide in our analytical laboratories because it is required for certain tests . . . But it would not be in any way accessible to the manufacturing process"; "Well, we're shocked, we're dismayed, we've learned that medications can be tampered with at the, we believe at the retail level").

Corporate America has contributed its unique viewpoint to this important debate. The Monsanto Company, a leading provider of agricultural products (such as seeds genetically engineered to be resistant to herbicides) with net sales of $5.46 billion in 2001,[11] has taken perhaps the most public stance on the issue. For example, in an interview on PBS' Frontline, Monsanto's CEO Hugh Grant spoke both about the worldwide benefits of agricultural biotechnology, such as reducing the world's use of harmful pesticides and the ability to provide foods to developing nations, as well as the potential concerns about genetic modification, such as gene migration and pest resistance. *See* Interview by PBS Frontline with Hugh Grant, *at* http://www.pbs.org/wgbh/harvest /interviews/grant.html.

Monsanto provides to the public a breadth of scientific information that might not otherwise be available. *See, e.g.*, "Monsanto Welcomes U.N. Report on Biotech's Benefits for Developing World" *at* http://www.monsanto.com /monsanto/layout/media/01/07-09-01.asp (last visited Nov. 11, 2002) (sharing "fundamental scientific data" Monsanto and others have developed using genetic modification). Even Monsanto's critics have applauded Montsanto's willingness to engage in this important debate and share its perspective and knowledge on the issue. *See* Gregg Hillyer, *Monsanto Makeover*, PROGRESSIVE FARMER, Feb. 2002 (praising Monsanto's "transparency"); *see also The Pharmageddon Riddle* (describing how Greenpeace invited Monsanto's CEO to its annual gathering to debate an opponent of genetic modification, an invitation that Monsanto's CEO accepted).

The *Kasky* decision, however, creates a strong incentive for Monsanto to disengage from the debate. In debating with its critics, Monsanto's representations about its genetically modified products would no longer be part of a fully protected exchange of information on an issue of public concern, but rather

11. *See* Monsanto Company 2001 Annual Report, available *at* http://www.monsanto.com.

statements about "business operations" that could give rise to liability. *See, e.g.*, Interview with Hugh Grant ("From a food safety point of view . . . these are technologies that have been more widely tested than any other food product that came before them in history . . . they are moving through the scientific regulatory system in Europe with flying colors at the moment").

Issues of great public debate also encompass scientific advances in the field of medicine, and the ethical issues such advances may raise. One such area is the science of cloning and the possible medical uses for the technology associated with it. As such advances came to the public's attention, a vigorous debate ensued concerning the ethical implications of these scientific discoveries. *See* "Therapeutic Cloning Under Fire" *at* http://www.lef.org/magazine/mag2002/mar2002_cover_west_01.html (Mar. 2002) ("when he [Advanced Cell Technology's ("ACT") CEO Dr. Michael West] announced recently that ACT had taken the first step towards human therapeutic cloning, he was suddenly criticized by everyone from President Bush to the Pope").

Once again, corporations that have a financial interest in cloning technologies have joined the public debate to add a unique perspective on the issue. ACT, which initially made the scientific breakthrough making cell cloning possible, has entered the debate on these issues, taking a diametrically opposed view to cloning's critics. *See id.* ("No serious ethicist or embryologist believes that a pre-implantation embryo is a human being. We are not talking about creating a pregnancy. We are talking about making a microscopic ball of cells with no body cells of any kind"). It is precisely these representations about ACT's cloning process, especially in the form of the robust analogies used by Dr. West, that would become fodder for strike suits (as well as suits brought by political advocacy groups opposed to human cloning).

III. AN ENORMOUS AMOUNT OF PROTECTED CORPORATE SPEECH WILL BE CHILLED

The public relations campaigns above demonstrate just a few examples of campaigns that have communicated vital information to the public on matters of importance. As disparate as all of the campaigns and public statements described above may be, they all share characteristics that illustrate why this Court should grant certiorari: (1) all concern issues of great public moment; (2) all involved the dissemination of facts related to the company's "business operations" and (3) the corporations involved all stood to benefit financially as a result of the speech.

If the *Kasky* decision stands, however, all of these campaigns will be subject to strict liability. Monsanto, ACT, and McDonald's are all speakers "engaged in commerce." *Kasky*, 45 P.3d at 311. Statements made during each of these campaigns arguably concerned the "business operations" of each of the companies. Finally, all of the campaigns—although some were taken in part to affect legislation and other regulation—were also in part to "promote . . . sales and profits." *Kasky*, 45 P.3d at 247. In short, because a prudent CEO would no longer be willing to risk speaking about any issue of public importance that also touches upon the "business operations" or profitability of the company the information flow to the public would be severely circumscribed.

IV. THE *KASKY* TEST REPRESENTS A SEA-CHANGE THAT RESTRICTS PREVIOUSLY PROTECTED SPEECH

The broad language of the *Kasky* decision creates an illusory distinction between "policy" discussion, and commercial speech which the California Supreme Court now defines as any statement about "actual conditions and practices" of the business. This distinction is unworkable in practice. The end result is that the test contains no limiting principles because it falsely assumes that because a corporation always is, in part, motivated by profits, that its speech is entitled to no First

Amendment protection. This is at odds with the Court's well-settled precedent. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (speech is entitled to full First Amendment protection notwithstanding it is undertaken by "large-scale business conducted for private profit").

The amorphous nature of the test also means that, as a practical matter, there is no guidance for *amici* or others to determine what corporate speech is entitled to First Amendment protection. The risks under the *Kasky* regime are even greater because *amici* often do not control the final presentation of press releases and other communications to the public, the media does. *Cf. Kasky*, 45 P.3d at 256 (statements made to reporters that are passed along to consumers can be commercial speech). Prudent, risk-averse companies will have no option but to decline speaking in order to avoid the possibility of strike suits.

Indeed, for those corporations who enter the public debate, California's broad remedies impose another, even more chilling threat. That law provides as a remedy for speech that, even though true on its face, may mislead some, a "Court-approved public information campaign" to compel a corporation to "correct" editorials and other speech on matters of public importance. *Kasky*, 45 P.3d at 250. In other words, under the California Supreme Court's test, not only would the corporation's speech be subject to a stricter standard of liability than the speech of its critics, but the Company could be compelled to finance a "public-information campaign" entirely against its interest to address potential "confusion" on the public's part.

This is fundamentally at odds with the governing principles of the First Amendment. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (California Public Utilities Commission's order that PG&E permit the "extra space" in its envelopes sent to customers to be used by a public interest group to voice a point of view PG&E did not agree with held to violate PG&E's First Amendment right not to speak). It inevitably will

result in a lopsided debate dominated by corporate critics, bereft of facts that reside exclusively with corporations. The consequences to a fully informed public are difficult to overstate, as Johnson & Johnson's life-saving Tylenol campaign graphically demonstrates.

The Court has taken care to review rulings that disrupt settled practices in the area of commercial speech. *See, e.g.*, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission regulation and a recently released Policy Statement interpreting the regulation that had the effect of completely banning electrical utilities from advertising violated the First and Fourteenth Amendments); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (holding that a newly-revised provision of the Virginia Code that regulated a licensed pharmacist's ability to publish price information violated the First and Fourteenth Amendments); *In re RMJ*, 455 U.S. 191 (1982) (holding that the newly-revised ethical rules of the Supreme Court of Missouri regulating lawyer advertising violated the First and Fourteenth Amendments). Because the *Kasky* decision threatens to disrupt even a greater amount of speech than the cases above—the decision affects *every corporation* that does business in California—certiorari is appropriate here.

In short, because corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, no responsible corporate spokesman speaks on a company's behalf without being concerned about the effects the statements may have on corporate sales and profits. Because all corporate speech is, and should be, uttered in the interests of benefitting the corporation in the eyes of potential consumers, the speech restricting effects of the California Supreme Court's test will be enormous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MOTION FILED
NOV 15 2002

(5)

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC. *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of California

MOTION OF EXXONMOBIL, BANK OF AMERICA, MICROSOFT, MONSANTO, AND PFIZER FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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24 pp

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to this Court's Rule 37.2(b), ExxonMobil Corporation, Bank of America, Microsoft Corporation, Monsanto Company, and Pfizer Inc., respectfully request leave of this Court to file this brief *amici curiae* in support of petitioners. Petitioners have consented to the filing of this brief; their letter of consent will be lodged with this Court. Respondent has withheld consent, thus necessitating this motion.[1]

ExxonMobil is the world's largest integrated oil company, engaged in oil and gas exploration, production, supply, transportation, and marketing in some 200 countries around the world.

Bank of America is one of the world's leading financial services companies, providing consumer and commercial banking to one in four households in the United States and serving clients in over 150 countries.

Microsoft is the worldwide leader in software, services, and Internet technologies for personal and business computing.

Monsanto is a leading global provider of agricultural products and integrated solutions that seek to improve farm productivity and food quality throughout the world.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel representing a party in this case authored this motion or brief in whole or in part and that no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this motion or brief.

Pfizer, the world's leading research-based health care company, discovers, develops, manufactures, and markets worldwide prescription medicines for both humans and animals and many of the world's best-known consumer brands.

Each of the *amici* does business in California and, accordingly, is subject to potential civil and criminal liabilities imposed under CAL. BUS. & PROF. CODE § 17200 *et seq.* and § 17500 *et seq.*

Like virtually every other large corporate enterprise in the United States, *amici* regularly speak out on issues of public concern and in so doing place before the public facts about their products, services, or business operations. In some instances, *amici* are responding to criticisms; in others, they are initiating public discussion. But in each such instance, their speech is an effort to engage public opinion, not to solicit business.

If a corporation's every press release, letter to an editor, customer mailing, op-ed article and website posting may, under the California statutes at issue here, be the basis for civil and criminal actions, corporate speakers will find it difficult to address issues of public concern implicating their products, services, or business operations—even to defend themselves in the court of public opinion when attacked.

Amici's participation in this case will aid the Court in two ways. First, *amici* will bring to the Court's attention the concern of a diverse group of large businesses that are constantly in the public eye. Second, *amici* will explain why it is imperative that the Court grant review now rather than wait for the completion of proceedings on remand, as well as why the Court should refine its commercial speech doctrine in a fashion that will better serve core First Amendment values.

Based on the foregoing, *amici* hereby move to file this brief *amici curiae* in support of petitioners in this case.

Dated: November 15, 2002

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BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The interest of *Amici Curiae* is fully set forth in the Motion that accompanies this brief.

SUMMARY OF ARGUMENT

Review should be granted because the California statutes, as construed by the California Supreme Court in this case, burden speech by corporate speakers that lies at the heart of the First Amendment. The effect of these statutes on First Amendment freedoms is both immediate and grave, threatening all corporate speakers with civil and criminal liability for engaging in protected speech.

The general chilling effect of the statutes exists now and will continue to exist regardless of the proceedings on remand. Only this Court can remedy the First Amendment harms caused by these statutes, and they are harms the Court should remedy now. The Court has granted review in similar circumstances on many other occasions, and it should do so here.

The California court's decision, by adopting a definition of "commercial speech" that goes far beyond anything the Court's commercial speech doctrine contemplates, burdens core First Amendment speech. But the California court's decision also reflects aspects of the doctrine that the Court should refine. The degree of First Amendment protection for a corporation's speech should not depend on the category—"commercial" or "non-commercial"—to which the speech is assigned. Here, as in all other realms of expression, content and context should be the touchstone of First Amendment analysis.

The fact that this Court has found it necessary to address the proper application of its commercial speech doctrine more than two-dozen times since 1976—more than

twenty times since it announced the *Central Hudson* test in 1980, and a dozen times in the last ten years alone—demonstrates that this Court should bring greater clarity to the doctrine. The obvious errors in the California court's decision on fundamental aspects of the doctrine make this the appropriate case to do so.

ARGUMENT

I. THE DECISION BELOW, IF NOT REVERSED, WOULD HAVE DEVASTATING IMPACTS ON CORPORATE SPEECH

A glance at a daily newspaper or a few minutes watching network news reveals a broad array of issues of intense public concern, where *amici* and other comparable businesses lie at or near the heart of the story. For *amici*, such issues range from global warming, the environmental effects of their operations or products, and human rights abroad to product safety, biotechnology, health-care costs, equitable treatment of customers, and diversity in the workplace. Every one of these issues of public concern relates directly or indirectly to the companies' products, services, or operations.

The decision below, if left uncorrected, would allow plaintiffs' lawyers to surf corporate websites, scan the daily press, or watch television looking for op-ed articles, press releases, speeches by management, letters to the editor, and the like in an attempt to find some statement as to which questions can at least be raised regarding accuracy. Suits could then be filed by a single individual seeking to impose massive liabilities on the corporate speaker in the hope of being able to convince a California judge or jury that the statement in fact was inaccurate or, even if accurate, might be misleading. Without question, the decision below has enormous consequences for free speech in the United States.

II. IMMEDIATE REVIEW IS WARRANTED

Although the California Supreme Court has remanded the case to determine whether Nike in fact violated the statutes as the California court construed them, this Court need not, and should not, wait to review the California Supreme Court's holding that those statutes, as thus construed, do not violate the First Amendment. Immediate review is not only permitted but required to remove the pall cast now by the statutes on speech by corporate speakers that lies at the core of the First Amendment.

A. As Construed by the California Supreme Court, the Statutes Chill Speech

As construed by the California Supreme Court, even a corporation's *truthful* statements about issues of public concern involving its products, services, or business operations are actionable if the plaintiff alleges that the statements are "either actually misleading or [have] a capacity, likelihood or tendency to deceive or confuse the public." App. 7a (quoting *Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985)).

Merely by making such strict-liability allegations, a public official or a private plaintiff can drag a corporation into potentially costly, intrusive, and protracted litigation—a prospect that this Court has repeatedly recognized chills the exercise of First Amendment rights. *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality opinion) ("It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))). And if the corporation's statements, although believed to be

truthful when made, turn out to have been mistaken, or if its statements, although truthful, are later deemed to have been misleading or even potentially misleading, the corporation faces substantial monetary and even criminal sanctions. The Court has recognized the chilling effect of such strict-liability rules on speech. *See, e.g., Smith v. California*, 361 U.S. 147, 150-52 (1959).

The statutes at issue not only chill corporate speakers seeking to initiate discussion of matters of public concern involving their products, services, or operations. They also deter a corporation from responding to criticism, thereby serving a corporation's critics as a backup weapon to be deployed whenever the corporation defends itself against its critics' claims. The attorney-fees provisions of California law, CAL. CIV. PROC. CODE § 1021.5, combined with the ease with which plaintiffs' lawyers can allege violations of the broadly worded statutes, provide a corporation's critics with a financial incentive to use the statutes as just such a weapon. *See generally Hewlett v. Squaw Valley Ski Corp.*, 63 Cal. Rptr. 2d 118, 146 (Cal. Ct. App. 1997) (awarding attorneys' fees under CIV. PROC. CODE § 1021.5 in plaintiffs' successful unfair competition action).[1]

These statutes, as construed by the California court, are what now confront petitioners and all corporate speakers over which California's courts could assert jurisdiction. The California Supreme Court's construction "fixes the meaning

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[1] *Cf. In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998) (Posner, J.) (describing "shenanigans" of certain contingent-fee attorneys in "accus[ing] the lawyers for the class and for the defendants—groundlessly, as far as we can tell—of defamation, bait-and-switch tactics, hoodwinking, infamy, dishonesty, illegality, intimidation, extortion, hypocrisy, hysteria, and Marxism").

of the statute," *Winters v. New York*, 333 U.S. 507, 514 (1948), and "puts these words in the statute as definitely as if it had been so amended by the legislature," *Wainwright v. Stone*, 414 U.S. 21, 23 (1973) (per curiam) (quoting *Winters*, 333 U.S. at 514). The words of the California Supreme Court "are the words of the statute." *NAACP v. Button*, 371 U.S. 415, 432 (1963).

B. Review of the Court's Decision Upholding the Statutes Should Not Be Delayed

This Court may exercise certiorari jurisdiction over the "final" judgment of a state's highest court. *See* 28 U.S.C. § 1257(a). The Court has "recurringly" granted review in cases where "there [were] further proceedings in the lower state courts to come." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). In this case, review of the issues presented in the petition is warranted under *Cox*. *See id.* at 482-83.

First, the California Supreme Court fully considered and squarely resolved the First Amendment issue that is the subject of this petition. On remand, if Nike prevailed on nonfederal grounds (no federal issues remaining), the state court's decision on the First Amendment issue would go unreviewed by this Court, and the pall cast by its decision over all corporate speakers would remain. *See id.* at 482-85. *Second*, a victory for Nike in this Court on the federal issue now would end the case, thereby preventing a waste of resources by the parties and the courts. *See id. Third*, and most crucially from *amici's* standpoint, "refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 483.

This Court has repeatedly granted review in cases like this one where a state court has sustained a state statute against First Amendment challenge and ongoing state court proceedings on remand are contemplated. "Adjudicating the proper scope of First Amendment protections has often been

recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989).

For example, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court granted certiorari and reversed the Minnesota Supreme Court's ruling that a bias-motivated crime ordinance was permissible under the First Amendment, even though the state court, upon upholding the St. Paul ordinance, had remanded for trial under the ordinance as interpreted. *In re R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991). Similarly, in *Keller v. State Bar*, 496 U.S. 1 (1990), the Court granted certiorari and reversed the California Supreme Court's decision that the state bar's use of dues to finance certain ideological activities was permissible under the First Amendment, *id.* at 4-7, 17, even though the state supreme court had remanded the case to the trial court for further proceedings. *Keller v. State Bar*, 767 P.2d 1020, 1033 (Cal. 1989).

In *Fort Wayne Books*, the Court held that, because "petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the ... [state court's] holding would bar further prosecution," 489 U.S. at 55, and because the case "involve[d] a First Amendment challenge," *id.* at 57, review was proper. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court reviewed, and reversed, the Florida Supreme Court's decision that the state's "right of reply" statute, granting political candidates a right to equal newspaper space to reply to criticisms, was permissible under the First Amendment. *Id.* at 243-46. The Court did so in a posture similar to that here: the state supreme court had remanded to the trial court for further proceedings on the plaintiff's claim against the newspaper. *Id.* at 246. Finally, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), this Court reviewed a state court decision construing a state statute to require a defamation plaintiff to show only fault, not falsity, and

sustaining the statute as so construed against First Amendment challenge. *Id.* at 771. Although the state court had remanded for a new trial under the statute as so construed, this Court grar ed review. *Id.* Just as the issue here is the protected status of petitioners' speech, the issue in *Hepps* was whether defamatory statements not proven false warranted First Amendment protection. *Id.* at 776-77.

* * *

The chilling effect of the California Supreme Court's decision exists now and will continue to exist as long as it remains unreviewed. For that reason, delaying review "would constitute and aggravate a deprival of ... [First Amendment] rights, if any, that the [petitioners] possess and may properly assert." *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1319, 1325 (1975) (opinion of Blackmun, J.) (in chambers). And "each passing day may constitute a separate and cognizable infringement of the First Amendment." *Nebraska Press Assoc. v. Stuart*, 423 U.S. 1327, 1329 (1975) (opinion of Blackmun, J.) (in chambers).

Where "uncertainty of the constitutional validity of [a state statute] restricts the present exercise of First Amendment rights.... it would be intolerable to leave unanswered ... an important question ... under the First Amendment; an uneasy and unsettled constitutional posture of [the challenged state statute] could only further harm the operation of a free press." *Miami Herald*, 418 U.S. at 247 n.6. Delay by this Court in granting review would all but guarantee irreparable injury to petitioners, *amici*, and countless other corporate speakers, all of whom, operating under substantial uncertainty, will have to choose between engaging in what they believe to be protected speech and avoiding potential substantial liability under a state statutory scheme of dubious constitutional validity.

For all of these reasons, immediate review of the California Supreme Court's decision is warranted.

III. THE COURT SHOULD REFINE ITS COMMERCIAL SPEECH DOCTRINE

Under this Court's commercial speech cases, "the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). Speech classified as "commercial" is subject to a less demanding standard of review, allowing greater regulation, than speech classified as "noncommercial." *Id.* at 64-65; *see also Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-66 (1980).

This dichotomous approach has produced inconsistent decisions by this Court. For example, the Court has applied its less demanding standard of review to commercial speech restrictions even where "the justification for allowing more regulation of commercial speech" was lacking. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (Stevens, J., concurring); *see also, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501-04 (1996) (opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.); *id.* at 518 (Thomas, J., concurring); *id.* at 517 (Scalia, J., concurring).[2] On the other hand, the Court has also invalidated commercial speech restrictions the purposes of which were unrelated to any distinction justifying differential regulation of commercial and noncommercial

[2] *See also Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1509 (2002) (Thomas, J., concurring); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

speech. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-94 (1999).

More generally, commercial speech is anomalously viewed as subordinate to and less deserving of First Amendment protection than, for example, the fare offered on the Playboy Channel. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny). And the Court has not provided definitions of "commercial" and "noncommercial speech," even though the category to which the speech is assigned determines its level of protection. *See Bolger*, 463 U.S. at 66-68 (enumerating criteria for identifying "commercial speech" but emphasizing that none of them is either necessary or sufficient); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); *44 Liquormart*, 517 U.S. at 521 (Thomas, J., concurring); *Coors*, 514 U.S. at 493 (Stevens, J., concurring); *Discovery Network*, 507 U.S. at 419-23; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).[3]

This is not to say that this Court's decisions lack guideposts for determining what the Court has meant by its references to "commercial speech": it has meant speech informing consumers about "who is producing and selling what product, for what reason, and at what price," *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976)); that is, "a communication that does no more

[3] *Cf. Playboy Entm't Group*, 529 U.S. at 817 ("'[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.' *Speiser v. Randall*, 357 U.S. 513, 525 (1958). "Error in marking that line exacts an extraordinary cost.").

than propose a commercial transaction," *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)); *see also Lorillard*, 533 U.S. at 554 (commercial speech is "speech proposing a commercial transaction" (quoting *Central Hudson*, 447 U.S. at 562)); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) ("[C]ommercial speech [is] usually defined as speech that does no more than propose a commercial transaction."); *Discovery Network*, 507 U.S. at 423 ("[P]roposal of a commercial transaction [is] '*the test*' for identifying commercial speech." (quoting *Bd. of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989))). *This* is the type of expression for which the commercial speech doctrine was devised; it was this type of expression, proposing a sale—"I will sell you the X prescription drug at the Y price"—that the Court had previously held to be unprotected, but then determined should be protected. *Va. State Bd. of Pharm.*, 425 U.S. at 761; *see also Bates v. State Bar*, 433 U.S. 350, 364 (1977) (Commercial speech "inform[s] the public of the availability, nature, and prices of products and services."); *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) ("[A]dvertising provides consumers with accurate information about the availability of goods and services.").

And the Court explained that it is the "commonsense difference[ ]" not between "commercial speech" and "noncommercial speech," but between *this* type of commercial speech (speech that does "no more than propose a commercial transaction") and "other varieties" of speech, that warrants "a different degree of protection." *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). It is *this* type of commercial speech—speech about qualities of the advertiser's "product or service"—that the government may insist be truthful, *id.*; that it may require to "appear in such a form, or include such

additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive," *id.*; and as to which the prohibition against prior restraints may be inapplicable, *id.*[4] And it is the "commonsense distinction" between *this* type of commercial speech and "other varieties of speech" on which the Court has declared that the *Central Hudson* test itself is "based." *Coors*, 514 U.S. at 482

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[4] "[T]he commercial advertiser generally knows the *product or service* he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and his price substantially eliminates any danger that government regulations of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression."

Coors, 514 U.S. at 495 (Stevens, J., concurring) (emphasis added) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 777-78 (Stewart, J., concurring)); *see also id.* at 495 n.4 ("Most of the time, if a seller is *representing a fact or making a prediction about his product*, the seller will know whether his statements are false or misleading and he will be able to correct them.") (emphasis added). Justice Stevens stated that it is not simply a corporation's ability to verify particular speech that explains why the First Amendment permits greater regulation of such speech; such reasoning would support regulation of any factual statement by a corporation on *any* matter within its direct knowledge. As Justice Stevens stated, it is the *combination* of the corporation's ability to verify what it says about its products or services and "the immediate harmful impact" of false commercial speech on consumer transactions that "explain[s] why we tolerate more governmental regulation of this speech than of most other speech." *Id.* at 496; *see also id.* (the concern is that "consumers may purchase products that are more dangerous than they believe or do not work as advertised"). The California Supreme Court mistakenly focused only on the verifiability of a corporation's speech and its resistance to chill.

(quoting *Central Hudson*, 447 U.S. at 562). In short, under *Central Hudson* it is not *all* types of commercial speech that receive lesser protection but only "some types" of commercial speech (those proposing commercial transactions) that the government may regulate "more freely than other forms of protected speech." *44 Liquormart*, 517 U.S. at 498 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

The California Supreme Court departed from this principle when it ruled that a corporation's speech not about its products and services as such, but about issues of public concern involving its products, services, or operations could be regulated as "commercial speech" simply because the corporation indirectly aims, through its speech, to promote its sales and profits. As Justice Thomas observed in a similar connection, such a justification for regulation of commercial speech is unduly broad because "[a]lmost everything a business does has the purpose of promoting the sale of its products," with the result that such a justification of a corporation's speech would encompass virtually anything that a corporation might say. *Lorillard*, 533 U.S. at 585 (Thomas, J., concurring).

The California Supreme Court fell into its error because, inferring from *Bolger* that "commercial speech" could mean almost anything, it believed that its only recourse was to consider whether the rationales that this Court has offered to justify greater regulation of "speech proposing a commercial transaction" justified similar regulation of the speech at issue in this case. Those rationales include a corporation's ability to verify speech about itself, and the supposed resistance of its speech to being chilled because of the corporation's economic motivation to speak. The California court expanded the definition of "commercial speech" subject to regulation as far as it believed these rationales would allow.

The result of the California court's extrapolation, however, is a definition of regulatable "commercial speech" that sweeps far beyond the type of transactional speech for which the commercial speech doctrine was devised, encompassing speech on matters of public concern that proposes no commercial transaction. This Court has never suggested that such speech may be subject to the same degree of regulation as speech that does "no more than propose a commercial transaction." If that is to be the new First Amendment rule (which plainly it should not be), it should be this Court, rather than the California Supreme Court, that so enlarges the doctrine. If it is not to be the rule, this Court should disapprove it.[5]

Bolger is not to the contrary. *Bolger* merely affirmed that "commercial speech" subject to regulation under *Central Hudson* does not escape such regulation simply because it "links a product to a current public debate." 463 U.S. at 68 (quoting *Central Hudson*, 447 U.S. at 563). The Court thus held that the mailings at issue in that case could be regulated under *Central Hudson* even though they contained "discussions of important public issues." *Id.* at 67-68. But the material in which these

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[5] If the First Amendment permits a corporation's speech on issues of public concern to be regulated as "commercial speech" under *Central Hudson*—simply because the speech addresses issues relating to the corporation's products, services, or operations—then the government could insist on pre-screening materials containing such speech and require that such materials "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive." *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24; *see also Zauderer*, 471 U.S. 626 (upholding such a disclosure requirement). This absurd, but alarming, result highlights the fundamental error in the California Supreme Court's decision.

discussions appeared were *advertisements*. *See id.* at 62. Although the Court stated that the informational pamphlets could not be characterized "merely as proposals to engage in commercial transactions," *id.* at 66, they were *at least that much*, and the only question addressed by the Court was whether their discussion of matters of public concern transformed them into fully protected speech. By contrast, the California Supreme Court has held that the First Amendment permits regulation of speech discussing matters of public concern that cannot fairly be characterized as proposals to engage in commercial transactions in the first place.

Several Members of the Court have expressed misgivings about the Court's commercial speech doctrine and the *Central Hudson* test that embodies it. *See Lorillard*, 533 U.S. at 571-72 (Kennedy, J., joined by Scalia, J., concurring); *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring); *Coors*, 514 U.S. at 493 (Stevens, J., concurring) (referring to "the misguided approach adopted in *Central Hudson*"). It is abundantly clear, after more than two-dozen cases, that both the doctrine and the test have not provided the needed guidance. Now is the time and this is the case "to break new ground." *Thompson*, 122 S. Ct. at 1504.

A categorical distinction between "commercial" and "noncommercial" speech is neither possible nor desirable. The two types of speech are not distinct: "the difference is a matter of degree." *Discovery Network*, 507 U.S. at 423. Moreover, what Justice Stevens has called the "artificial[ ]" and "rigid" "commercial/noncommercial distinction," *Coors*, 514 U.S. at 494 (Stevens, J., concurring), simply is not helpful in determining the appropriate level of protection for particular speech that includes *both* commercial *and* noncommercial elements. "The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse

the First Amendment secures." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting).

The Court should replace its *Central Hudson* test with a more nuanced approach. Such an approach would key the standard of First Amendment review not only to the purpose of a regulation, as several Members of the Court have urged, but, decisively here, also to the content and context of the particular "commercial" speech involved. To serve fully First Amendment values, the Court's commercial speech doctrine should prescribe a standard of review "that reflects the need for distinctions among contexts, forms of regulation, and forms of speech." *Thompson*, 122 S. Ct. at 1515 (Breyer, J., joined by Rehnquist, C.J., and Stevens & Ginsburg, JJ., dissenting).

And as Justice Brown noted in her dissent, even "[w]ithout abandoning the categories of commercial and noncommercial speech, the court could develop an approach better suited to today's world by recognizing that not all speech containing commercial elements should be equal in the eyes of the First Amendment." App. 61a (Brown, J., dissenting) (suggesting possible standards of review for regulating corporate speech on issues of public concern).

Review should be granted not only to reverse the California Supreme Court's decision but to fashion a commercial speech doctrine more in keeping with fundamental First Amendment principles.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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November 2002

(6)

Supreme Court, U.S.
FILED
NOV 15 2002
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., ET AL.,
Petitioners,

v.

MARC KASKY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Motion for Leave to File *Amicus Curiae* Brief and Brief for Amicus Curiae The Center for the Advancement of Capitalism In Support of Petitioners

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23 pp

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Motion for Leave to File *Amicus Curiae* Brief

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Center for the Advancement of Capitalism ("CAC") hereby requests leave to file the accompanying *amicus curiae* brief. Such brief is submitted in support of granting the petition for a writ of certiorari.

Counsel for petitioners has consented to the filing of this brief. Counsel for respondent Marc Kasky has not consented.

As set forth in the accompanying brief, CAC is a nonprofit corporation that seeks to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC has an interest in matters affecting the economic rights of corporations and individuals, and has previously filed comment letters and *amicus curiae* briefs with federal courts.

The instant case involves a matter fundamental to the protection of individual rights and capitalism. The decision

below effectively denies Nike the full exercise of its rights under the First Amendment.

CAC believes that the decision below, if affirmed, will have a chilling effect on the exercise of fundamental rights held by all Americans, whether acting as individuals or agents of corporations. Because there are additional issues not addressed in the petition that this Court should consider, CAC respectfully requests leave to file the accompanying brief containing discussion of two additional issues.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

The instant case raises a number of issues relevant to CAC's work, notably the scope of First Amendment

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protection afforded corporate speech. Because the petitioners, however, declined to raise three issues directly arising from the decision below, *amicus* would ask the Court to consider these issues in addition to the two questions presented in the petition for certiorari.

SUMMARY OF ARGUMENT

The petition for certiorari correctly identifies two questions for this Court to review. In addition, *amicus* would draw the Court's attention to two additional issues that warrant granting the writ and ultimately reversing the decision below.

Nike focuses on whether the commercial speech doctrine is correctly applied in this case. But beyond applicability, the Court should also consider whether the doctrine itself remains good law. The recent case history of the commercial speech doctrine shows this Court has yet to establish an objective standard that lower courts and citizens can safely rely upon to separate "commercial" and "noncommercial" speech. In the absence of an objective standard, the door has opened to various claims that have nothing to do with preventing fraud or advancing some other legitimate government interest. This case is a perfect example. Marc Kasky is not attempting to redress consumer fraud or advance a proper governmental objective. He is using the judiciary to sanction a company whose labor practices he dislikes and whose public comments he wishes to silence. Kasky's suit against Nike goes far beyond the original, narrow scope of the commercial speech doctrine first articulated sixty years ago in *Valentine v. Chrestensen*.[2]

In expanding the commercial speech doctrine, this Court has sought to completely separate and isolate commercial speech from noncommercial speech. But such a separation serves no identifiable governmental interest, and the confusion arising from the Court's uncertainty in

[2] 316 U.S. 52 (1942).

defining the difference opened the door for the decision below. The California Supreme Court essentially held that a speaker's economic motivation is sufficient to trigger regulation under the commercial speech doctrine, and in the absence of clear guidance from this Court, that interpretation is not wholly inconsistent with *Central Hudson v. Public Service Commission*[3] and *Bolger v. Youngs Drug Products Corp.*[4] Unless this Court reconsiders and overrules the modern commercial speech doctrine articulated in those cases, the "economic motivation" standard will likely become the governing philosophy in the lower courts and among state legislatures. This would be a serious error, for such a standard would have a chilling effect on business and individual rights, and far exceed any legitimate government objective.

The second issue not addressed by the petition or the decision below is Kasky's standing. While California law does permit Kasky to initiate a "private attorney general" action on behalf of the general public, this construction of standing violates Article IV of the federal Constitution, which requires all states to maintain a "republican form of government." In permitting Marc Kasky to exercise the state's monopoly on the use of force, the California legislature violated its obligation to maintain a republican form of government. Consequently, this Court should hold that the provision of CAL. BUS. & PROF. § 17204 permitting private attorney general actions is unconstitutional.

ARGUMENT

I. The Court Should Grant Certiorari to Reconsider the Commercial Speech Doctrine Set Forth in *Central Hudson* and *Bolger*.

[3] 447 U.S. 557 (1980).
[4] 463 U.S. 60 (1983).

Nike argues that the commercial speech doctrine does not apply to this case, but it does not directly address the validity of the doctrine itself. It would be a mistake for the Court to take such a narrow approach. Given the nearly sixty years of confusion the commercial speech doctrine has generated within the judiciary and the general public, this case presents an excellent opportunity for the Court to decisively settle the issue.

a. *The original commercial speech doctrine, as briefly stated in* Valentine v. Chrestensen, *provides the appropriate standard of review.*

Circuit Judge Alex Kozinski aptly describes the moment of Creation: "In 1942, the Supreme Court plucked the commercial speech doctrine out of thin air."[5] That year, the Court decided *Valentine v. Chrestensen*[6], a case arising under New York's Sanitary Code. To circumvent the code's ban on distributing commercial handbills on public streets, respondent Chrestensen produced two-sided handbills, one side inviting would-be patrons to tour his submarine, and the other "a protest against the City Dock Department's refusal to permit him to moor the submarine at the pier he preferred."[7] In this manner, Chrestensen reasoned the First Amendment would shield the handbill's distribution because the protest message constituted protected speech.

This Court disagreed, holding that the intent of the handbill was clearly commercial, and thus properly subject to the city's authority to regulate publicly-owned streets. The Court's opinion contained a single sentence of great importance: "We are...clear that the Constitution imposes no...restraint on government as respects purely commercial

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[5] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).
[6] 316 U.S. 52 (1942).
[7] Kozinski & Banner at 627.

advertising."[8] And thus, the commercial speech doctrine was born.

Valentine's message is simple: The First Amendment cannot be used as a pretext for evading legitimate government authority. New York City has the right to govern the use of roads it owns. Chrestensen had no more right to distribute his handbills on public streets than he did to demand a newspaper run his advertising free of charge. Free speech, essentially, had nothing to do with the legal question. The *Valentine* court properly identified the two-sided handbill as an effort to circumvent the law by manufacturing a free speech issue: "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[9]

But the *Valentine* court should be recognized for what it did not say as well. It did not attempt to create a broad category of speech unprotected by the First Amendment. Such a step would have been unsupported by the facts of the case and inconsistent with existing case law. In fact, as Judge Kozinski points out, *Valentine* cites no precedent in support of its central holding regarding commercial speech.[10] This is because, *amicus* contends, the *Valentine* court was simply restating an accepted principle of the common law—that a government may exercise administrative authority over property it directly controls—rather than creating novel precedent.

b. *The subsequent evolution of the commercial speech doctrine created an unworkable standard.*

In the intervening six decades, the simple *Valentine* standard morphed into the modern commercial speech

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[8] 316 U.S. at 54.
[9] *Id.* at 55.
[10] Kozinski & Banner at 627.

doctrine. There is no single reason for this transformation. As legislatures increased their efforts to regulate private business, courts became convinced that some differentiation had to be made between "commercial" and "noncommercial" speech. Although this differentiation has no foundation in the Constitution's text or historical precedent prior to 1942, this Court nonetheless attempted to distinguish the two categories of speech.

The two key attempts at segregation came in *Central Hudson* and *Bolger*. In *Central Hudson*, the Court imposed a four-part test for analyzing regulations of commercial speech. To borrow from Justice Brown's dissent from the decision below, *Central Hudson* promised much, but solved nothing.[11] The Court first defined commercial speech as "expression related solely to the economic interest of the speaker and the speaker's audience."[12] Next, the Court held the Constitution afforded commercial speech "a lesser protection" than other forms of expression.[13] Finally, the amount of lesser protection "turns on the nature both of the expression and of the governmental interests served by its regulation.[14]

In essence, *Central Hudson* commands judges to segregate all speech into commercial and noncommercial categories, and to afford lesser protection to the latter.[15] This proved to be an impossible task, especially in light of the rapid synthesis of traditional advertising with other expressive media. The music video, Internet homepages, and even novels like Ayn Rand's *Atlas Shrugged*, are all examples of commercially-motivated acts of speech. To separate the commercial elements from the noncommercial would effectively destroy both the medium and the message.

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[11] *See Kasky v. Nike*, 45 P.3d 243, 268 (Cal. 2002) (Brown, J., dissenting).
[12] *Central Hudson*, 447 U.S. at 561.
[13] *Id.* at 563.
[14] *Id.*
[15] *See Kasky*, 45 P.3d at 268.

Bolger only makes this problem worse. The Court opens by affirming the traditional viewpoint that commercial speech is expression that "does no more than propose a commercial transaction."[16] But then *Bolger* tells us speech *may* be commercial if it meets one or more of the following tests: (1) the message is in advertising format; (2) there is a reference to a product; or (3) the speaker has an economic motive.[17] What we do not learn from *Bolger*, however, is just which of these three factors proves decisive in labeling speech commercial, thereby denying it full First Amendment protection. The Court said the presence of one of these factors is not, by itself, sufficient, but that, as in *Central Hudson*, "the nature both of the expression and of the governmental interests served"[18] must rule.

Bolger is not an objective standard, but a circular one: If the government can establish some interest in regulating expression, and it can demonstrate the presence of at least one of the three factors, than it can classify the expression as commercial speech. That is precisely what the California Supreme Court did. Relying on the government's interest in preventing fraud, the decision below classifies Nike's expression as commercial speech because it is in advertising format (at least some of it is) and Nike's motives were economic.[19] But by that logic, all corporate speech falls outside the First Amendment, since a for-profit corporation's very existence is economically motivated.

Since *amicus* believes this Court did not intend to deny First Amendment protection to *all* corporate speech, the question remained how to successfully segregate commercial speech from the noncommercial variety. But it was never clear what governmental interest is even served by such a classification. Unlike the businesses involved in

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[16] *Bolger*, 463 U.S. at 66 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumers Council*, 425 U.S. 748, 762 (1976)).
[17] *Id.* at 66-68.
[18] 447 U.S. at 563.
[19] *See* Pet. App. 21a-22a.

this Court's initial rulings establishing the commercial speech doctrine, Nike's business is not one traditionally targeted for industry-specific government regulation with respect to speech.[20] There is no historical evidence that suggests the California legislature was specifically concerned with an apparel manufacturer responding to criticism of its labor practices.

The simple fact that the current commercial speech doctrine has strayed from the initial "proposing a commercial transaction" standard indicates the core problem. Nike did not propose a commercial transaction in the challenged advertising, but rather influenced consumers to view the company positively. That is not the same thing, yet the California Supreme Court took the connection as a matter of common sense. It is no wonder that it did so, considering this Court's own explanation of the need for the commercial-noncommercial separation in *Ohralik v. Ohio State Bar Association*:[21]

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we

[20] *See generally Bigelow v. Virginia*, 421 U.S. 809 (1975) (discussing restrictions on lawyer advertising); *Virginia Pharmacy Bd.* (discussing restrictions on prescription drug advertising); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (discussing a state ban on liquor advertising); *Central Hudson* (discussing a state ban on utility advertising.)

[21] 436 U.S. 447 (1978).

> instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[22]

This paragraph is incoherent. It is difficult to see the "common sense" of protecting the First Amendment from "devitalization" through the existing commercial speech doctrine. Corporate speech is just as important to the realm of ideas as speech initiated by citizens, activists and public policy groups. The mere presence of a commercial motive does not "dilute" the First Amendment's intent, effect, or application.

JUSTICE THOMAS in his concurring opinion in *44 Liquormart, Inc. v. Rhode Island*,[23] expressed skepticism as to this Court's continued efforts to segregate commercial and noncommercial speech. He correctly noted: "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than noncommercial speech."[24] This position is a far cry from *Ohralik*'s judicial hyperbole. It is also the correct position, and this Court should adopt JUSTICE THOMAS's position as a substitute for the current commercial speech doctrine of *Central Hudson* and *Bolger*.

c. *There are only two ways to resolve the current confusion: overrule the commercial speech doctrine or affirm the decision below.*

The alternative to abandoning the commercial speech doctrine is to fully embrace the California Supreme Court's

[22] *Id.* at 455-456.

[23] 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

[24] *Id.* at 522.

interpretation in the case below. If commercial speech must be segregated, than the only criterion for doing so is the speaker's economic motive. While this approach toward fully segregating all commercial speech would be consistent with the practice of other democratic countries, such as the United Kingdom, applying this standard in the United States would radically alter American commerce and society. Recently, the British Government's Independent Television Commission banned the further telecast of "The Wall Street Journal Editorial Board with Stuart Varney," a current affairs discussion program produced in the United States, and initially aired in Britain on CNBC Europe.[25] In a letter to CNBC Europe, the ITC "sharply reprimanded" the network for airing the program, because British policy prohibits current affairs programming from having commercial sponsors. The Wall Street Journal was accused of sponsoring the program in order to promote sales of their print newspapers. The ITC reasoned: "The finding against CNBC Europe has nothing to do with...'the ability of a commercial TV network to exercise free speech,' but everything to do with the right of viewers to have access to news and current affairs that is, and can be seen to be, free from commercial influence."[26]

The commercial speech doctrine, if resolved in favor of the California Supreme Court's position, would authorize precisely the kind of government action taken by the British ITC. If the government takes it upon itself to purge all commercial elements from the realm of political speech, the consequences will be devastating. Witness the current debate in the United States over campaign finance reform, where a recent law banned corporate donations to political campaigns on the grounds that such donors might corrupt the political process.[27] There is not much breathing space

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[25] *Banned in Britain*, WALL ST.J., November 8, 2002, at A10.

[26] *Id.*

[27] *See generally* Publ. L. No. 107-155; H.R. REP. NO. 107-131, at 1-4 (2001).

between campaign finance laws and a ban on sponsored current affairs programming.

The only way to prevent a gradual slide towards the British concept of "free speech" is for this Court to pull itself back from the breach caused by the modern commercial speech doctrine. These are the only alternatives. Doing nothing—maintaining the status quo—will only delay this inevitable decision.

d. *The Court should reaffirm the right of individuals to engage in unshackled speech.*

On a fundamental level, there is a clear disconnect between the principle of individual rights and today's commercial speech doctrine. This problem is philosophic, reflecting the larger conflict in American culture between the principles of individualism and freedom expressed in the Declaration of Independence and animated by the Constitution, versus the modern—and now dominant—belief in collectivism and state paternalism. In accepting this case for review, the Court should ultimately reject the view that an individual who acts based on an economic motive forfeits First Amendment protections.

In maintaining the modern commercial speech doctrine, the Court has failed to recognize that human beings value their membership in society largely for the selfish economic benefits that come from trade with others. In a society that recognizes individual rights, all interactions are voluntary, based on mutual exchange by mutual agreement to mutual benefit. It is only through such a system of free and uncoerced exchange that people can properly benefit from associating with one another.

Yet in failing to protect the speech necessary to define or defend an individual's economic relationships with others, the Court has relegated self-interested speech to an intellectual ghetto. The California Supreme Court holds that

because Nike is acting out of its own economic self-interest, it ultimately has no right to submit its views to the public.

But the California Supreme Court's moral premise is unfounded and inconsistent with a system of government dedicated to protecting individual rights. One's political interests are just as selfishly motivated as one's economic interests. One cannot claim to uphold the sanctity of an individual's right to make political speeches on issues that affect him and simultaneously damn him when he publicly defends his right to make and sell a pair of shoes because that is his trade. Outside of cases of fraud or compelling government interest—which apply to all citizens, regardless of motive or economic interest—there is no legitimate justification in segregating the protections afforded political speech from those afforded to commercial speech. As far as the individual is concerned, both political and economic speech are essential to the success of one's life and one's ability to live peacefully with other men.

II. California's "Private Attorney General" Rule Violates the Guarantee Clause of the Federal Constitution.

Under Section 17204 of California's Business and Professions Code, an unfair competition claim may be initiated "by any board, officer, person, corporation or association or by any person acting for the interests of itself, its members, or the general public." The final four words of this clause, as applied in this case, violate the United States Constitution. At a minimum, this Court should remand the standing question back to the California Supreme Court.

Marc Kasky initiated the instant case against Nike without alleging any injury to himself or any direct, personal knowledge of the facts. He acted, instead, as a "private attorney general" under Section 17204, seeking injunctive relief on behalf of the general public of California. Nike did not challenge Kasky's standing to initiate this action in their

petition here, and there is no discussion of the issue in the proceedings below.

On its face, this appears to be a *qui tam* civil action. That is to say, Kasky sued Nike on behalf of himself and the state of California. The *qui tam* rule has been upheld by this Court, notably in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[28] as sufficient to establish Article III standing. But in the instant case, Kasky cannot seek this protection, because § 17204 does not properly apply the *qui tam* rule explicated in *Stevens*.

The Court outlines the evolution of *qui tam* in *Stevens*, noting its origin in 13th Century English law: "private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf."[29] By asserting a Crown interest, individuals could have their cases heard in the "respected" royal courts. Unlike the instant case, however, the plaintiff alleged an injury independent of any offense to the King. Beginning in the 14th Century, the royal courts expanded their jurisdiction over private cases, and this form of *qui tam* fell into disuse.[30]

Both English and American laws recognize a statutory form of *qui tam*. The *Stevens* court described two types of these statutes: "those that allow injured parties to sue in vindication of their own interests (as well as the Crown's)," and "those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves."[31] These latter "informer statutes" were specifically upheld as constitutional in *Stevens*. In that case, a former employee of the Vermont Agency of Natural Resources filed a federal *qui tam* civil action alleging, based on his personal knowledge, that the agency defrauded the United States Government. While

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[28] 529 U.S. 765 (2000).
[29] *Id.* at 774.
[30] *Id.*
[31] *Id.* at 775.

Stevens did not allege an injury to himself, his direct knowledge permitted the action to proceed.

In the instant case, Kasky asserted third-party statements against Nike were true without any personal knowledge of the actual facts.[32] This hardly qualifies him to act as an "informer" under the *qui tam* rule; after all, an informer must be informed. Had the third parties Kasky cited filed suit, this discussion might well be moot, but since Kasky is the only plaintiff in the proceedings below, his standing alone is the issue. Since he's alleged neither personal injury nor personal knowledge of the facts, he cannot assert a *qui tam* claim consistent with *Stevens*.

But since Nike does not raise this issue, and the courts below did not consider this question, two possibilities emerge: (1) this Court could remand the question of *qui tam* standing back to the California Supreme Court for clarification; or (2) Sec. 17204 was not intended by the legislature to be a *qui tam* statute, but a direct grant of prosecutorial power to every individual residing in California. If the latter is true, then the statute violates the Guarantee Clause of Article IV.

The Guarantee Clause provides, in relevant part, "The United States shall guarantee to every State in this Union a Republican Form of Government."[33] As defined by the Colorado Supreme Court, "A republican form of government is one in which the supreme power rests in all the citizens entitled to vote and is exercised by representatives elected, directly or indirectly, by them and responsible to them."[34] This requirement applies not just to state legislatures, but to the executive and judicial branches as well. Even where executive or judicial officers are not directly selected, all persons exercising the state's authority are ultimately accountable to the people through the legislature. This Court has recognized the essential,

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[32] Pet. at 3-4.
[33] U.S. CONST. art. IV, § 4.
[34] *Morrissey v. Colorado*, 951 P.2d 911 (Colo. 1998).

"distinguishing" feature of republican government is the "right of the people to choose their own officers for governmental administration."[35]

The Guarantee Clause is a direct constitutional restriction on the power of the states. James Madison noted the purpose of the Guarantee Clause was to give the federal government "authority to defend the system against aristocratic or monarchial innovations."[36] In plainer terms, a state is free to adopt its own organization of government, but it may not "exchange republican for anti-republican Constitutions."[37]

While the Guarantee Clause forbids the states from establishing a monarchy, it also precludes them from implementing anarchy. A republic grants a monopoly of the lawful use of force to representative bodies and agents. Section 17204, in contrast, grants that same monopoly to every individual, corporation, and association that happens to maintain a California address. This creates, to borrow from this Court's commercial speech reasoning, a dilution and devitalization of the state's executive power. California cannot, under the color of republican government, designate more than thirty million individuals to act as private attorneys general. Doing so places every business within the state at the whim of individuals—motivated by nothing more than animus—who can file suit under the state's prosecutorial authority. This goes beyond even the abuse of *qui tam* informer suits acknowledged by the *Stevens* court.[38]

This Court has been appropriately reluctant to invoke the Guarantee Clause as grounds for asserting the judicial power. But unlike prior cases where the Court held Guarantee Clause claims to be nonjusticiable political

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[35] *In re Duncan*, 139 U.S. 449 (1891).
[36] THE FEDERALIST NO. 43 (James Madison).
[37] *Id.*
[38] 529 U.S. at 775.

questions,[39] this case does not involve such a question. The issue here does not address how California apportioned prosecutorial power among its own agencies, nor does it raise any separation of power matters. The only question is whether the state can assign prosecutorial power to individuals not accountable to the state or the people generally.

State courts have invoked the Guarantee Clause when the accountability line has been crossed. In *Morrissey v. Colorado*, the Colorado Supreme Court voided a referendum requiring state legislators and federal representatives to support a specific amendment to the United States Constitution. The court held, in part, that the referendum violated the Guarantee Clause "because it takes away from elected officials the right to exercise their own judgment and vote the best interests of their constituencies as they perceive them."[40] Just as Colorado legislators must be free to exercise judgment over legislative matters, California's elected and appointed prosecutors must exercise judgment over how to initiate state action in civil matters where there is no concurrent private cause of action.

The issue is accountability. Even where civil enforcement is delegated by a state to an appointed official or agency, the legislature retains ultimate authority to direct state action, either through direct legislation or the almighty power of the purse—appropriations. The same is true of local district attorneys, who are both elected by the people they serve and accountable for their operating budgets. Kasky, in contrast, is politically and financially accountable to nobody. He is using the façade of state action to mask what is, at its core, a private grievance with Nike that has no basis in fact or law. Review by this court of Kasky's standing is warranted to ensure, at a minimum, that § 17204 is not

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[39] *See Ohio ex rel. Bryant v. Akron Metropolitan Dist.*, 281 U.S. 74 (1930); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).
[40] *Morrissey*, 951 P.2d at 917.

fatally flawed with respect to Article III or the Guarantee Clause of Article IV.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Dated: November 15, 2002.

Supreme Court, U.S.
FILED
NOV 15 2002
CLERK

No. 02-575

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

NIKE, INC., *ET AL.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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November 15, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

31 pp

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully requests leave to file the attached brief *amicus curiae* pursuant to the Court's Rule 37.2. Petitioners have consented to the filing of this brief in a letter filed with the Clerk. Respondent has withheld consent.

The Chamber is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in this case because the California Supreme Court significantly curtailed freedom of expression by holding that *most* speech by businesses is "commercial speech" subject to reduced First Amendment protection. This holding is so extreme that even speech on public policy matters such as labor, environmental, and economic issues involving a company's operations can be denigrated as "commercial speech." A substantial amount of speech is at jeopardy.

Just as petitioner Nike, Inc. discussed its overseas labor operations in the statements at issue, other businesses frequently discuss various aspects of their operations in the course of ongoing public policy debates. For example, automobile manufacturers, such as the Ford Motor Company, articulate their positions on whether and to what extent automobile emissions cause pollution and health effects, and the costs and feasibility of requiring further reductions in automobile emissions, *see, e.g., Bill Ford's Speech to Greenpeace, at* www.ford.com/ en/ our Company/

environmental Initiatives/ environmental Actions/ bill Ford (Oct. 5, 2000). Health care providers and drug manufacturers, such as Merck, state their positions on the causes of their rising health care and drug prices, and the form of regulation or deregulation that will best help to control those prices, *see, e.g., Remarks by Raymond V. Gilmartin, Chief Executives Club of Boston, at* www.merck.com/newsroom/executivespeeches/011900.html (Jan. 19, 2000). Energy companies, such as ChevronTexaco and Duke Energy, state their positions on whether or to what extent their operations cause or contribute to global climate change, and the role of their operations in any changes, *see, e.g.*, Statement on Global Climate Change, at www.chevron texaco.com/ environment (last visited Nov. 11, 2002); Statement on Global Climate Change, *at* www.dukeenergy. com/ decorp/ content/ environment/deip12.asp?RBU=1 (last visited Nov. 11, 2002). Insurance companies, such as AIG and General Re, state their positions on the feasibility of providing terrorism insurance and the economic need for legislative action, *see, e.g., Terrorism Insurance Still On Front Burner For Insurers, Lawmakers*, Ins. J., *at* www.insurancejournal.com/magazines/southcentral/2002/05/ 13/features/19079.htm (May 13, 2002). And manufacturers, such as General Electric, state their positions on environmental discharges and the effects that any discharges have had on rivers and other natural resources, *see, e.g.*, Statement on GE Hudson River Efforts, *at* www.ge.com/commitment/ehs/leadership/ehs_hudson_river. htm (last visited Nov. 11, 2002).

Under the California Supreme Court's decision, all of this speech could be subjected to the reduced First Amendment protection accorded "commercial speech," and corporations could be held strictly liable for any and all factual misstatements made in the course of heated and fast-moving debates. Such treatment marks a serious intrusion on our system of free expression. Speech on public policy matters has always been understood to lie at the *heart* of the First Amendment, and incorrect statements regarding such matters have always been protected because mistakes are inevitable in such debates. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). All other speakers on these subjects receive full First Amendment protection for those very reasons.

Nonetheless, the California Supreme Court is now suppressing corporations' speech and discriminating against them by holding that speech by businesses (but not their opponents) on important public policy matters is subject to the reduced protection accorded "commercial speech." This disparate and unfair treatment is not limited to speech in California. Because corporations' speech is increasingly disseminated on a nationwide and even worldwide basis, the decision below would threaten not only speech in California, but speech across the globe. In light of the Chamber's strong interest in defending its members against this assault on their freedom of speech, the Chamber seeks leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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Thornhill v. Alabama,
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Union of Needletrades Indus. & Textile Employees, AFL-CIO v. The Gap, Inc.,
No. 300474 (Cal. Super. Ct., S.F. Div. filed 1999).....19

United States v. United Foods, Inc.,
533 U.S. 405 (2001).....3, 14

Valentine v. Chrestensen,
316 U.S. 52 (1942).....9

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun.,
425 U.S. at 762 (1976)
(*Virginia Pharmacy*) ..... passim

Other Authorities

Arlen W. Langvardt,
Commercial Falsehood and the First Amendment: A Proposed Framework,
78 Minn. L. Rev. 309 (1993).....15

Bill Ford's Speech to Greenpeace,
at<http// www.ford.com/ en/our Company/
environmental InitiativenvironmentalActionbillFord>
(Oct. 5, 2000) 19

Jean Wegman Burns,
Confused Jurisprudence: False Advertising Under the Lanham Act,
79 B. U. L. Rev. 807 (1999).....4

Laurence H. Tribe,
American Constitutional Law
896 (2d ed. 1988) 4, 11

Remarks by Raymond V. Gilmartin, Chief Executives Club of Boston, at <http//
www.merck.com/newsroom/executivespeeches/011900.
html> (Jan. 19, 2000) 19

Robert Post,
The Constitutional Status of Commercial Speech,
48 U.C.L.A. L. Rev. 1 (2000) 4

Statement on GE Hudson River Efforts, *at <http//*
www.ge.com/ commitment/ ehs/
leadership/ehs_hudson_river.htm> 20

Statement on Global Climate Change, *at <http://*
www.dukeenergy. com/decorp/ content/
environment/deip12.asp?RBU=1 (last visited Nov. 11,
2002)> 20

Terrorism Insurance Still On Front Burner For Insurers,
Lawmakers, Ins. J., *at <http//*
www.insurancejournal.com/magazines/southcentral/2002
/05/13/features/19079.htm> (May 13, 2002) 20

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus* is described in the foregoing Motion for Leave to File.[1]

SUMMARY OF ARGUMENT

For years, the Court has sent conflicting signals on the definition of "commercial speech." The resulting jurisprudential uncertainty has led the lower courts to take widely diverging approaches to determining whether corporate speech is also "commercial speech" subject to reduced protection under the First Amendment. In this case, the California Supreme Court deepened that conflict by creating yet another test for determining whether speech is "commercial." This test is both breathtakingly broad and deeply menacing to our system of free expression. According to California's highest court, "commercial speech" includes all statements of fact: (i) by persons engaged in commerce (including all businesses); (ii) to an audience including actual or potential purchasers of their products (which include almost all Americans in the case of a company like Nike); (iii) on commercial matters (which include nearly all matters on which corporations have any reason to speak).

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine has been designed to *broaden* the First Amendment's reach by granting limited protection to product advertisements previously held unprotected. But now, the California Supreme Court has employed the "commercial speech" doctrine to *restrict* the First Amendment's protections by subjecting speech at the core of the First Amendment –

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

including speech on important public policy matters such as globalization, environmentalism, escalating health care costs, and so on – to the reduced level of protection accorded "commercial" speech. This makes no sense. As the Court explained long ago in *Thornhill v. Alabama*, speech "concerning the conditions in industry . . . [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U.S. 88, 103 (1940). This case presents an excellent vehicle for clarifying one essential limit on the definition of "commercial speech": at a barebones minimum, such speech must address the attributes of a company's products or services, as opposed to its business operations generally. Otherwise, speech that lies at the core of the First Amendment would be relegated to its periphery.

The second reason the Court should grant *certiorari* is to confirm that even if expression is "commercial speech," that label, without more, is not dispositive of the applicable level of constitutional protection. The Court has sent conflicting signals on that question in the past, and this case presents an excellent vehicle for the Court to address the ever-increasing uncertainty by holding that the "commercial speech" label is not a license for discrimination among speakers on important public policy matters such as those at issue here.

The Court's guidance on these important questions is very much needed by the entire business community. As matters stand, the lower courts' uncertainty regarding the definition and treatment of commercial speech is deterring speech on important public policy matters that should be encouraged, not discouraged. Moreover, the increasingly nationwide and even international scope of corporate speech means that many corporate speakers are effectively bound by the law of the least-protective jurisdiction, which is now California. As a result, California's draconian regime is deterring speech around the globe. Indeed, at least one other similar lawsuit has already been filed in California against

eighteen national and international clothing suppliers and retailers. The Court's guidance is needed now.

ARGUMENT

I. THE COURT'S GUIDANCE IS NEEDED ON THE DEFINITION OF COMMERCIAL SPEECH.

This case presents an important and timely opportunity to address the confusion and division generated by the Court's past pronouncements on the definition of "commercial speech."

A. The Court's Precedents Have Generated Substantial Uncertainty Regarding the Definition of "Commercial Speech."

The Court has announced at least three different tests for determining whether speech is "commercial." The Court has "usually defined" commercial speech as "speech that does *no more* than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). The Court employed yet a third test in *Bolger v. Youngs Drug Prods. Corp.* by considering three factors: whether the communication was an advertisement; whether it referred to a specific product or service; and whether the speaker had an economic motivation for the speech. 463 U.S. 60, 66-68 (1983). The *Bolger* Court added to the indeterminacy of the Court's precedents by indicating that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

The Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use that definition in either *Bolger* or in [*Board of Trustees v. Fox*, 492 U.S. 469 (1989)] .... In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech."

City of Cincinnati v. Discovery Network, 507 U.S. 410, 422-23 (1993) (emphasis in original; citations omitted). The Court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

Lower courts and commentators have expressed frustration with the long-running uncertainty. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that the Court's "attempts to define 'commercial speech'" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B. U. L. Rev. 807, 831-32 (1999); *see also* Laurence H. Tribe, *American Constitutional Law* 896 (2d ed. 1988); Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 5 (2000) (noting

that the "boundaries" of commercial speech are "quite blurred").

B. The Lower Courts Are in Conflict on the Definition of "Commercial Speech."

The indeterminacy of the Court's precedents has inevitably led to a conflict among the Courts of Appeals and the California Supreme Court. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of the *Central Hudson* test," "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does *no more than propose a commercial transaction*." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998) (emphasis added). In doing so, the Seventh Circuit, speaking through now-Chief Judge Flaum, stressed "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Id.* at 684.

The Ninth Circuit has imposed an especially stringent variant of the *Virginia Pharmacy* test. (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun.*, 425 U.S. at 762 (1976)(*"Virginia Pharmacy"*)). After determining that the Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]," the Ninth Circuit limited commercial speech to traditional advertising. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). As the court explained, "[t]his simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia Pharmacy*). Although the Ninth Circuit later granted *en banc* review in *Thomas*, the eleven-member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains

"persuasive authority" in the Ninth Circuit. *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999).

Perhaps for that reason, at least two subsequent panels of the Ninth Circuit have held speech to be noncommercial under similarly restrictive tests. In *Hoffman v. Capital Cities/ABC, Inc.*, the Ninth Circuit held that speech was not commercial because it did not appear "*in a traditional advertisement printed merely for the purpose of selling a particular product*." 255 F.3d 1180, 1185 (9th Cir. 2001) (emphasis added). The court further explained that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties, and common sense tells us that this is not a simple advertisement." *Id.* at 1185-86 (internal quotation and citation to *Virginia Pharmacy* omitted). *See also Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection.").

The Tenth Circuit has agreed with this analysis by holding that "commercial speech is best understood as speech that *merely advertises a product or service* for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) (emphasis added). Because the speech at issue in *Cardtoons* did not "merely advertise[] a product or service," the Tenth Circuit held that it was not "commercial speech." *Id.*

In contrast to the circuits that have followed variants of the *Virginia Pharmacy* test, other circuits have followed an expansive version of the *Bolger* test. *See, e.g., Procter & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir. 2001); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999). In *Procter & Gamble*, one company made statements about a competitor's business operations – specifically, about

whether the competitor donated its profits to the Church of Satan – and suggested that consumers boycott the competitor's products for that reason. Under *Bolger*, the Fifth Circuit concluded that this was "commercial speech" if the speaker "acted *substantially* out of economic motivation." *Procter & Gamble Co.*, 242 F.3d at 552-53 (emphasis in original). The court of appeals reasoned that the second *Bolger* factor was satisfied by references to the competitor's products, and "[t]he first factor – whether the speech is an advertisement – seems to collapse into the third factor," which is the speaker's motivation. *Id.* The Fifth Circuit thereby held that even boycott-related speech, as opposed to traditional product advertising, can be considered commercial speech.

Here, the California Supreme Court did not follow any of the variants of the *Virginia Pharmacy* test applied in the Seventh, Ninth, or Tenth Circuits, or even the expansive *Bolger* test fashioned by the Fifth Circuit. Instead, it added to the decisional-law confusion by crafting yet another multi-part test. *See* Pet. App. 17a-20a. Remarkably, the California Supreme Court suggested that its newly-minted test applies for only some purposes; some other (unspecified) test might apply in other cases. *See id.* at 17a. Thus, the court below not only added another "commercial speech" test to the jurisprudential mix, it even threatened further proliferation within its own jurisdiction.

The resulting instability is especially manifest in this case. Nike's speech is not "commercial" under the tests applied in other jurisdictions. Nike did far "more than propose a commercial transaction." *Commodity Trend Serv.*, 149 F.3d at 684-85. Indeed, Nike said nothing resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Nor did Nike otherwise engage "in a traditional advertisement." *Hoffman*, 225 F.3d at 1185. It certainly did not "*merely* advertis[e] a product or service." *Cardtoons*, 95 F.3d at 970 (emphasis added). Instead, Nike spoke generally

about its business operations overseas, in the context of an ongoing public policy debate, without mentioning any products or services, or offering any prices or terms of sale. *See* Pet. App. 3a-4a.

By holding such speech "commercial," the California Supreme Court ruled in conflict with the much narrower interpretations of the circuits that follow variants of the *Virginia Pharmacy* test. Its decision reaches even farther than the Fifth Circuit's application of the *Bolger* test, inasmuch as Nike did not refer to any specific products or services for sale.

C. The Court Should Reduce the Confusion and Conflict Among the Appellate Courts By Holding that, At a Minimum, Only Speech Regarding the Attributes of Goods or Services for Sale Can Be Considered "Commercial."

This case presents an important vehicle for addressing the lower courts' confusion concerning the meaning of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech advertising the attributes of products or services for sale can be considered "commercial." In contrast, speech that addresses business operations in general, or other matters of public policy, should be accorded full First Amendment protections.

1. The History of the "Commercial Speech" Doctrine Demonstrates that It Addresses Only the Advertising of Products and Services, Not Corporate Speech Generally.

This line is strongly supported by the history of the "commercial speech" doctrine, which shows that the doctrine was intended to *grant* limited protection to product advertising, not to *limit* the protections already applied to other types of corporate speech. The Court developed the modern "commercial speech" doctrine in the 1970s in

response to its earlier holding that "the Constitution imposes *no . . . restraint* on government as respects *purely commercial advertising*." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (emphasis added). Specifically, the Court gave birth to the doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." *Virginia Pharmacy*, 425 U.S. at 760-61.

In doing so, the Court could not have been clearer that by "commercial speech," it was referring only to the narrow kind of product advertisement addressed in *Valentine*:

> [T]he question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. *The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.*

Id. at 760-61 (emphasis added). From its genesis, the "commercial speech" doctrine was designed to address speech that does *not* "editorialize on any subject," "report any particularly newsworthy fact," or "make generalized observations . . . about commercial matters." *Id.* Instead, it was designed to give limited *protection* to speech that does "*no more* than propose a commercial transaction." *Id.* .at 761, 762 (internal quotation omitted).

Significantly, the type of expression at issue here – speech on public policy matters involving corporations – was held to be fully protected long before the Court extended

limited First Amendment protection to "commercial" speech. As early as 1940, the Court held that self-interested speech "concerning the conditions in industry and the causes of labor disputes" is not only protected by the First Amendment, it is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940); *see also Thomas v. Collins*, 323 U.S. 516 (1945). Thus, speech about business operations generally – as opposed to product advertising – has always received full First Amendment protection, not the limited protection subsequently devised for "commercial speech."

The Court has never departed from this understanding. To the contrary, the Court has repeatedly recognized that the advertisement of products or services – as opposed to business operations generally – is the *sine qua non* of "commercial speech." The Court explained in the early years of the "commercial speech" doctrine that such speech "serves to inform the public of the availability, nature, and prices of products and services," *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), because it "relates to a particular product or service." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979);[2] *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (referring to "commercial speech" as "commercial price and product advertising"). More recently, the Court has confirmed that "'[t]he entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about *goods and services* and the right of

[2] *Friedman* further emphasized this point by holding that a trade name can be considered to be "commercial speech" only to the extent that it "acquires meaning over a period of time by associations formed in the minds of the public between the name and some standard of price or quality" of the goods or services provided. 440 U.S. at 12; *see also id.* at 16.

government to regulate the sales of such *goods and services*.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quoting L. Tribe, *American Constitutional Law* § 12-15, p. 903 (2d ed. 1988)) (emphasis added; other emphasis omitted).

In keeping with this long-established understanding of the "commercial speech" doctrine, the Court (unlike the California Supreme Court) has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). For example, the Court has held that while a manufacturer's speech about the attributes of a specific product is "commercial" regardless of whether it is linked to a public debate, *see Bolger*, 463 U.S. at 67-68, an energy company's speech to its customers about energy conservation is not "commercial." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9 (1986) (plurality opinion). Such expression "extends well beyond speech that proposes a business transaction and includes the kind of discussion of matters of public concern that the First Amendment both fully protects and implicitly encourages." *Id.* (internal citations and quotations omitted).

2. Nike's Speech Is Fully Protected.

So does Nike's speech. Far from advertising its products' attributes, Nike responded to public criticism on one of the great issues of the day – globalization, which arouses such strong feelings that anti-globalization protests recurringly shut down parts of the Nation's capital. This is speech at the core of the First Amendment, not the type of "commercial speech" excluded altogether from First Amendment protection prior to *Virginia Pharmacy*. *See, e.g., Thornhill*, 310 U.S. at 103.

To be sure, the California Supreme Court suggested that Nike could have avoided the "commercial speech" label by discussing international labor issues generally without

mentioning any facts regarding its operations. *See* Pet. App. 26a. But that is no more plausible than requiring respondent's lawyers to draft a Brief in Opposition without mentioning any facts in the case. Opinions frequently if not invariably flow from facts, and are certainly more persuasive when they rest on articulable facts. The public would in no wise benefit from a legal regime that encouraged Nike to discuss conclusions divorced from facts. Under such an odd regime, the public would by definition receive less information from Nike, and have less basis for assessing Nike's statements. "[P]ublic debate must not only be unfettered; it must also be informed." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 n.18 (1978) (internal quotation omitted).

Indeed, corporations are generally accorded the same free speech rights as other speakers precisely because the First Amendment is designed in part to protect the public's access to information, and "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *Bellotti*, 435 U.S. at 777; *see also Pac. Gas & Elec.*, 475 U.S. at 8. Suppressing speech merely because the speaker is a corporation would run contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Accordingly, this should be an easy case. If Nike had included references to specific products or services in its statements, this would at least be a closer case. If Nike had engaged in brand-name advertising that was designed to cause people to believe that its products are generally of high quality or low cost, this would likewise be a closer case. If Nike had included false statements such as "Made in the U.S.A." on the labels of specific products, this would likewise be a closer case. But instead of making any statements connected with the sale of specific goods or

services, or otherwise promoting the attributes of its goods or services, Nike spoke about its treatment of third-world laborers in the context of an ongoing public policy debate. That expression falls well outside the "commercial speech" category.

II. THE COURT'S GUIDANCE IS NEEDED ON THE TREATMENT OF COMMERCIAL SPEECH.

Even if the speech were deemed "commercial," that should scarcely be the end of the matter. In the past, the Court has sent conflicting signals on whether the "commercial speech" label alone dictates the applicable level of First Amendment protection, or whether further analysis is required. The Court should take this opportunity to confirm that the "commercial speech" label does not invariably trump all other strands of First Amendment jurisprudence, especially the fundamental prohibition against discrimination among speakers.

A. The Court Has Sent Conflicting Signals on the Treatment of "Commercial Speech."

The Court has also "followed an uncertain course" in determining what level of protection to accord speech that has been determined to be "commercial." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring in part and in judgment). In some cases, the Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501; *see also, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and noncommercial speech"). But in other cases (and especially in older cases) the Court has held the "commercial speech" label dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

The Court's most recent precedents have only added to the uncertainty. In *United Foods*, the Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 533 U.S. at 409-10 (citing opinions of Stevens, J. and Thomas, J.). But the Court concluded that it "need not enter into the controversy" because the restriction at issue in that case could not be upheld under any standard. *Id.* at 410. In *Lorillard*, the Court recognized that a *majority* of the Justices have criticized *Central Hudson*, but again concluded that the traditional test sufficed for purposes of that case:

> Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. *See, e.g.*, [*Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999)] (Thomas, J., concurring in judgment); [*44 Liquormart*, 517 U.S. at 501, 510-514] (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

533 U.S. at 554-55; *see also id.* at 571 (Kennedy, J., joined by Scalia, J., concurring in part and in judgment) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it").

Most recently, in *Thompson v. Western States Medical Center*, the Court again noted that "several Members of the Court have expressed doubts about the *Central Hudson* analysis." 122 S. Ct. 1497, 1504 (2002). But the Court again declined "to break new ground," in part because "[n]either party . . . challenged the appropriateness of applying the *Central Hudson* framework" in that case. *Id.*

The resulting state of affairs has led to unfortunate results. In *Procter & Gamble,* Judge Smith in writing for the Fifth Circuit held that a corporation's speech about a competitor's religious affiliation could be deemed false "commercial speech" entitled to *no* First Amendment protection. The Fifth Circuit recognized, however, that this speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." 242 F.3d at 550. As a result, Judge Smith went out of his way to emphasize that he questioned this result. He discussed at length a law review article suggesting that plaintiffs should at least be required to prove negligence on the part of a corporate speaker that made an incorrect statement. *See id.* at 557-59 (citing Arlen W. Langvardt, *Commercial Falsehood and the First Amendment: A Proposed Framework*, 78 Minn. L. Rev. 309 (1993)). But Judge Smith found that his hands were tied. While he found this proposal "tempting" and even "compelling in a number of respects," Judge Smith felt "compelled to reject it" in light of *Central Hudson* and other precedents of the Court. *See id.* at 557-58.

In this case, the California Supreme Court likewise wrestled mightily with the Court's jurisprudence. In addition to crafting an entirely new definition of "commercial speech," the state supreme court also purported to limit that definition to the application of "state laws barring false and misleading commercial messages." Pet. App. 1a-2a. That limitation makes no sense, because "commercial speech" is "commercial speech," period. It is bizarre to say that the

very same speech is "commercial" if misleading but "noncommercial" if nonmisleading. Whether "commercial speech" is false and misleading goes to the relevant level of protection, not to whether it is "commercial" in the first place. Nonetheless, the court's attempt to limit its holding in this manner reflects a recognition that the applicable level of protection should not always turn only on whether speech falls within that court's test for "commercial speech," but should instead reflect other considerations as well. With that suggestion we have no disagreement. *See also* Pet. App. 41a (Brown, J., dissenting).

B. The Court Should Avail Itself of this Opportunity to Hold that the "Commercial Speech" Label Is Not Alone Dispositive of the Applicable Level of First Amendment Protection.

This case provides an important opportunity to address the treatment of commercial speech. While no comprehensive reassessment of *Central Hudson* is required to decide this case, the Court would foster the fundamental values behind "the freedom of speech" if it were to confirm that all speakers on a public policy matter are to be treated equally under the law, regardless of whether a speaker is engaged in "commercial" speech. This is familiar doctrine. A neutrality principle has long been embedded in First Amendment jurisprudence. Thus, it is now a commonplace that the government may not discriminate among speakers by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

Yet that is precisely what the California Supreme Court did here. It accorded Nike less protection than that enjoyed by its critics. Thus, the Court should avail itself of this opportunity to hold that even if a corporation's expression on a public policy matter is deemed "commercial speech," it still cannot be punished without the same showing of fault

(be it negligence, actual malice, or willfulness) that would be required in an action brought against any other participant in the debate (such as a defamation suit brought by the corporation).

A contrary conclusion would leave First Amendment freedoms hanging by too slender a thread. In this case, Nike's speech was plainly not "commercial" because it did not address in any way the attributes of goods or services for sale. But typically, the determination whether speech is "commercial" turns on "a matter of degree." *Discovery Network*, 507 U.S. at 423. Indeed, Justice Thomas has "doubt[ed] whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*, 533 U.S. at 575 (Thomas, J., concurring in part and in judgment).

Under the California Supreme Court's holding, however, a distinction that is often a minor difference in degree is transformed into a major difference in kind. If Nike's speech is not commercial, then it is entitled to full First Amendment protection. But if it is commercial, it is entitled to *no* protection if it is later determined to be incorrect, and only limited protection if it is correct. *See* Pet. App. 10a. Especially given the tenuousness of the commercial/noncommercial speech distinction, this sharp disparity in treatment makes little sense. As one court has pointedly noted, "using the mere identification of commercial speech as the analytic tool [would] operate with a meat cleaver instead of a scalpel, and would amputate much of the core of protected speech from the body of the First Amendment." *Nat'l Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 646 (D. Md. 1992).

Of course, the simplest way to resolve this case would be to hold that Nike's speech was not "commercial." But if the Court concludes that the speech was commercial, then it should also hold that the speech's status as "commercial"

speech is not dispositive. Instead, the bedrock principle of neutrality dictates that however Nike's speech is labeled, it must be treated the same as all others' speech on the same public policy debate.

III. THE COURT'S REVIEW IS NEEDED TO PREVENT IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY MATTERS.

The Court's review is needed to prevent immediate harm. The confusion spawned by the Court's "commercial speech" precedents has made it exceedingly difficult for corporate counsel to determine which statements are fully protected by the First Amendment and which are not. Such uncertainty can only "inhibit the exercise of [First Amendment] freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation omitted).

The decision below has greatly heightened the need for intervention. The increasingly nationwide nature of corporate speech means that the law of the least-protective jurisdiction effectively governs the national and even international statements of thousands of corporations. If California punishes speech, then nationwide speakers are precluded, as practical matter, from disseminating it at all.

As matters stand, that means that *most* corporate speech may now be treated as "commercial" speech. The California court held that "commercial speech" includes all statements of fact: (i) by persons engaged in commerce (including all businesses); (ii) to an audience including actual or potential purchasers of their products (which include almost all Americans in the case of a company like Nike); (iii) on commercial matters (which include nearly all matters on which corporations have any reason to speak). *See* Pet. App. 17a-19a.

As a result, companies now face the unenviable choice of remaining quiet on important public policy debates concerning their own operations, or facing strict liability for any misstatements they may make in the context of heated and fast-moving debate. The risk of being sued is far from trivial: in this very case, respondent freely admits that he suffered "no harm or damages whatsoever," and has no "personal knowledge" of the facts underlying this lawsuit. Compl. ¶¶ 3-8. Nonetheless, Nike has been subjected to this lawyer-driven lawsuit. And at least one other similar lawsuit has been filed in California against eighteen national and international clothing suppliers and retailers. *See Union of Needletrades Indus. & Textile Employees, AFL-CIO v. The Gap, Inc.*, No. 300474 (Cal. Super. Ct., S.F. Div. filed 1999).

This regime should not be tolerated. Corporations routinely inform the public of important public policy issues relating to their business operations. As we chronicle in the accompanying motion, automobile manufacturers, such as the Ford Motor Company, state their positions on whether and to what extent automobile emissions cause pollution and health effects, and the costs and feasibility of requiring further reductions in automobile emissions, *see, e.g., Bill Ford's Speech to Greenpeace, at* www.ford.com/en/ourCompany/environmentalInitiatives/environmentalActions/bil l Ford (Oct. 5, 2000). Health care providers and drug manufacturers, such as Merck,. state their positions on the causes of their rising health care and drug prices, and the form of regulation or deregulation that will best help to control those prices, see, e.g., *Remarks by Raymond V. Gilmartin, Chief Executives Club of Boston, at* www.merck.com/newsroom/executivespeeches/011900.html (Jan. 19, 2000)>. Energy companies, such as ChevronTexaco and Duke Energy, state their positions on whether or to what extent their operations cause or contribute to global climate change, and the role of their operations in any changes, *see, e.g.*, Statement on Global Climate Change,

at www. chevron texaco. com/environment; Statement on Global Climate Change, *at* www.dukeenergy. com/ decorp/ content/ environment/deip12.asp?RBU=1 (last visited Nov. 11, 2002)> (last visited Nov. 11, 2002). Insurance companies, such as AIG and General Re, state their positions on the feasibility of providing terrorism insurance and the economic need for legislative action, *see, e.g.*, Terrorism Insurance Still On Front Burner For Insurers, Lawmakers, Ins. J., *at* www. insurance journal. com/ magazines/ south central/2002/ 05/ 13/features/ 19079.htm (May 13, 2002). And manufacturers, such as General Electric, state their positions on environmental discharges and the effects that any discharges have had on rivers and other natural resources, *see, e.g.*, Statement on GE Hudson River Efforts, *at* www. ge.com/ commitment/ehs/ leadership/ ehs_ hudson_river.htm (last visited Nov. 11, 2002).

Under the California Supreme Court's decision, all of these types of speech are potentially subject to strict liability. In each instance, a corporate speaker addresses the American public (including its customers) on a matter involving its own business operations and the effects of those operations. And in each instance, a plaintiff might sue in California based on any and all misstatements made by the company in the course of the public policy debate – whether or not the plaintiff was injured by the misstatements. If the Court were to deny *certiorari*, companies nationwide, and even worldwide, could speak on matters of great public policy concern only on pain of strict liability in California. That should not be permitted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 15 2002
CLERK

(8)

No. 02-575

In the
Supreme Court of the United States

NIKE, INC., ET AL.,
Petitioners,

v.

MARC KASKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PETITIONERS

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Respondent has refused to consent to the filing of an amicus curiae brief by the Civil Justice Association of California (CJAC). Accordingly, CJAC hereby moves, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amicus curiae* brief in support of Nike Inc., et al.'s Petition for a Writ of Certiorari. The brief immediately follows this motion.

Amicus is a twenty-five year old non-profit organization whose membership is made up of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve the state's civil liability laws in terms of fairness, efficiency, economy and certainty. Toward these ends, CJAC regularly petitions the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress of laws concerning who pays, how much, and to whom when wrongful conduct is charged.

California's Unfair Competition Law ("UCL") figures prominently in CJAC's efforts to restore some semblance of fairness and sanity to the scope and application of liability laws. It has become, for reasons we explain, a major source of unfairness to those caught within its prohibitory sweep against "business practices" deemed "unlawful, unfair or fraudulent . . . [or] unfair, untrue or misleading advertising." (Cal. B & P Code § 17200.)

CJAC participated as amicus curiae in support of petitioner Nike, Inc. in the California Supreme Court because we feared that if appellant ultimately prevailed in his argument there will be no realistic opportunity for those who wish to publicly defend themselves against what they perceive as unfair attacks on their business practices without paying

dearly for that defense. We argued that when, as here, it comes to publicly uttered statements by a company in its own defense against charges that its overseas subcontractors are violating the laws of the countries in which they operate, the constitutional guarantee to freedom of expression should trump the ban of the UCL against false or misleading advertising. We seek to participate here for the same reason, and with the purpose of informing the Court about various anomalies of the UCL in comparison with analogous laws of other states that make this case suitable for a grant of certiorari.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The Civil Justice Association of California ("CJAC" or "amicus") is a twenty-five year old non-profit organization whose membership is made up of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve the state's civil liability laws in terms of fairness, efficiency, economy and certainty. Toward these ends, CJAC regularly petitions the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress of laws concerning who pays, how much, and to whom when wrongful conduct is charged.

California's Unfair Competition Law ("UCL") figures prominently in CJAC's efforts to restore some semblance of fairness and sanity to the scope and application of liability laws. It has become, for reasons we explain, a major source of unfairness to those caught within its prohibitory sweep against "business practices" deemed "unlawful, unfair or fraudulent . . . [or] unfair, untrue or misleading advertising." (Cal. B & P Code § 17200.)

CJAC participated as amicus curiae in support of petitioner Nike, Inc. in the California Supreme Court because we feared that if appellant ultimately prevailed in his argument there will be no realistic opportunity for those who wish to publicly defend themselves against what they perceive as unfair attacks on their business practices without paying dearly for that defense. We argued that when, as here, it comes to publicly uttered statements by a company in its own defense against charges that its overseas subcontractors are

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[1] This brief was written in whole by CJAC's counsel, and not at all by Nike, Inc. Further, CJAC made the only monetary contributions in the preparation of this brief.

violating the laws of the countries in which they operate, the constitutional guarantee to freedom of expression should trump the ban of the UCL against false or misleading advertising. We seek to participate here for the same reason, and with the purpose of informing the Court about various anomalies of the UCL in comparison with analogous laws of other states that make this case suitable for a grant of certiorari.

INTRODUCTION

The UCL is unlike any other unfair trade practice or false advertising law – state or federal – in this country. It bars anyone from engaging in "unlawful, unfair or fraudulent" activity, or "unfair, untrue or misleading advertising," terms broad enough to sweep within their ambit just about anything imaginable that gives offense to someone. No one need actually suffer injury from, or be deceived by, the conduct complained about in order to sue under the UCL. A defendant stung by it, however, can take no solace from a judgment rendered that the matter is concluded because there is no *finality* to UCL litigation. It just keeps on keeping on. A new and different plaintiff may, acting on behalf of the general public, sue the same defendant for the exact same complained of activity that was just resolved in an earlier UCL suit. (*Stop Youth Addiction v. Lucky Stores, Inc.* (17 Cal4th 553, 583 (1998)).) While damages are not recoverable, injunctive relief and restitution are; and a defendant ordered to pay back money under the restitution remedy can be forgiven for not fathoming how this differs from being socked with a damage award. On top of all this, a successful plaintiff can often obtain court-awarded attorney's fees for prosecuting the UCL claim as a self-appointed representative of the amorphous "public," an extraordinary "bounty hunter" feature from another law that,

brigaded with the UCL, makes it almost self-executing. (Cal. C. of Civ. Proc. § 1021.5.)

The UCL did not start out this way, overreaching laws rarely do. It instead grew from a modest codification of the common law of unfair competition into today's virtual omnibus law by the process of accretion combined with occasional "leaps" of legislative and judicial gloss placed on it. Understanding how that growth occurred makes clear why, unless this Court acts now, the UCL will remain uncabined and unconfined, an omnivorous statute that impairs legitimate business activities, chills free expression and treads on the public interest.

STATEMENT

This case presents a constitutional issue of immense importance—*viz.*, are statements that a company makes in press releases and news conferences defending itself against charges that it subcontracts with foreign businesses who engage in unfair or unlawful practices, subject to liability under the UCL[2] notwithstanding the protections of the First Amendment; and, if so, can the company be ordered to undertake a court-approved public information campaign to remedy its alleged "false advertising"? The trial and intermediate state appellate court said "No," but a bare majority of the California Supreme Court disagreed.

By "false advertising" respondent Marc Kasky, a self-appointed member of the public on whose behalf he brings suit,[3] refers entirely to statements made by "just do it"

[2] Cal. B & P C § 17200 et. seq.

[3] Cal. B & P C § 17204, which specifies who can bring UCL suits, "has been interpreted by the . . . Court to authorize standing for *any person or organization* to sue to enjoin an unfair practice, regardless of whether the person or organization has suffered injury as a result of the practice." McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for*

athletic shoe maker, Nike. These statements were made in press releases, letters to the editor and the like, wherein Nike defended itself against charges by its critics concerning the wages, hours, and working conditions in its subcontracted Asian footwear factories. The gravamen of the complaint is that "Nike's athletic shoes are made in [overseas] sweatshops," but there is no attempt in this UCL action to get directly at those "sweatshops" in the countries where they operate. Neither does respondent claim that the UCL prohibits Nike from contracting with overseas companies who are in violation of their own country's laws on wages and working conditions. He has not, so far at least, attempted to "bootstrap" the violation of applicable foreign law by a Nike subcontractor onto the "unlawful" or "unfair" prongs of the UCL and thereby get at Nike in California, an approach which, if successful, would convert California courts applying the UCL into international ombudsmen, and jettison long established principles of national sovereignty and international law.

What respondent cannot accomplish directly by getting at the conduct to which he objects, however, he has achieved indirectly by getting at the "speech" given in defense or denial of that conduct. This "indirection" is in terms of the law used (the UCL rather than the laws of the foreign countries where the subcontractors operate) and the target (not the subcontractors themselves, but the domestic U.S. company with whom they contract to make shoes, Nike). By categorizing Nike's statements in defense of its business dealings with its overseas subcontractors as "commercial speech," respondent claims, and a majority of the state's highest court agrees, that expression is subject to regulation

California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions (1995) 46 *HAST. L.J.* 797, 814-815 and authorities therein cited. (Italics added.)

under the UCL, specifically the prohibition against "fraudulent business practices." This is an especially draconian provision, as judicial gloss on it makes actionable "speech" that does not involve advertising and even practices that involve no untrue statements.[4] All a plaintiff need show to prevail under this prong of the UCL is the likelihood of public deception, not that any member of the public was actually deceived.

Now, it has long been a cornerstone of First Amendment jurisprudence that just because government can abolish an activity does not mean that it can suppress "speech" concerning that activity.[5] While creation of the "commercial speech" category has resulted in occasional backsliding from this principle,[6] respondent and California's high court have reduced it to a new nadir by standing it on its head—*i.e.*, while state law can do nothing directly about the objected to conduct of foreign "sweatshops," the UCL prohibits any speech in defense of that alleged conduct which is "misleading or false" by anyone who has business dealings with the subcontractors. If this seems a bit of overstatement, it is not. The UCL does not define what is a "business practice," but it is clear that it can be a single past act and is likely as broad as the business practices that come within the sweep of the Unruh Civil Rights Act, Cal. Civ. C. §51: "[e]verything about which one can be employed," and

[4] See *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432 and *American Philatelic Soc. v. Claibourne* (1935) 3 Cal.2d 689, 696-699.

[5] See, e.g., *Pickering v. Board of Education* (1968) 391 U.S. 563 (though school board may terminate from employment a non-tenured teacher for no reason whatsoever, it cannot fire her for writing a letter to the editor of which it disapproved.).

[6] See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.* (1986) 478 U.S. 328, 345.

"synonymous with calling, occupation, or trade engaged in for the purpose of making a livelihood or gain."[7]

Carried to the limits of its logic, respondent's position, sanctioned by the state supreme court, permits maintenance of a UCL action against a newspaper that "falsely" or "misleadingly" defends the labor practices of Nike's Asian subcontractors. After all, publication of the "false" or "misleading" article, editorial or advertisement would be done in the course of the newspaper's business practice. It would undoubtedly be in furtherance of a "commercial transaction," i.e., selling the newspaper to readers and the advertisement to those who pay to run it. Curiously, a boycott of Nike goods by appellant and those who wish to bring pressure on Nike to improve its foreign subcontracting business is protected by the First Amendment; but if respondent has his way, a rebuttal to that boycott must be monitored by the court under the UCL for its truthfulness. (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886 (economic boycott by civil rights organization protected by First Amendment).)

Respondent and the narrowest majority possible of the California Supreme Court would, in other words, have the government instead of the public act as arbiter of what is "true" and "false" in public debate over compliance by foreign subcontractors with the laws of the countries where they do business. This is not, to say the least, a role the federal or state constitutions favor for government. "[Authoritative] interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker."[8] Nonetheless,

[7] *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468.

[8] *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270-271.

unless this Court reverses the decision below, those who do business in California will be subject to government regulation through liability laws for publicly defending their business practices. It is an *in terrorem* means of regulation because the UCL is unprecedented in the breadth of its scope, its absence of any standing requirements and the lack of finality in its application.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The UCL was, like Mary Shelley's Frankenstein, created with good intentions that have now, as this case shows, plainly gone awry. Its creators are two co-equal and co-ordinate branches of state government – the legislature and the courts. Each added a dimension or attribute to the UCL during its growth over the past three decades, some seemingly minor at the time and others of greater moment albeit, when viewed in isolation, not especially worrisome. Now that the UCL has, as this case again illustrates, morphed into a malignancy in terms of its scope and application, neither creator is realistically able to do the radical surgery necessary to make it function fairly and efficiently. Each branch of government points the finger of responsibility for the UCL's current incarnation to the other; and each claims that the other branch, by acquiescing to whatever latest wrinkle its co-ordinate last placed on the UCL, obviously approves of that construction.

In the course of this "buck-passing" metamorphosis of the UCL, vested interests have, not surprisingly, cropped up to defend its most recent and expansive iteration. As the UCL's elastic reach has extrapolated, so have those who benefit from that reach grown in size and influence sufficient to thwart state legislative or judicial reform of the UCL, what they describe as "turning back the clock" to the previous case that expanded the UCL before the last one. Thus the

direction of the UCL's movement has been consistent – outward and expansionist, enveloping an ever greater array of proscribed conduct, and upward, making it easier and more attractive for more people to go after that conduct.

This peculiar historical development of the UCL yields a statute different from that of all other states who have analogous laws codifying common law prohibitions on unfair competition, most modeled on the Federal Trade Commission Act enacted at the turn of the 20th century. In these other states, either the legislatures, the courts or both have imposed limits on standing or who can assert the UCL, the scope of its prohibited conduct and the relief available under it that are not found in California's unfair competition law. These differences, while impacting most obviously and severely upon those doing business in California, ironically also effectively immunize cases brought in California state courts from being brought in or removed to federal courts. California's UCL, then (as interpreted by its state courts) effectively sets the standards for all the other states regarding allowable business practices since no business is an island, but a ship sailing in a stream of interstate commerce. Businesses who want, then, to do what businesses do in California, will conform their practices to what California, the state with the most onerous unfair competition law, requires. Accordingly, if the UCL is ever to become a fair law of reasonable scope and sensible application, this case presents that rare and essential opportunity.

REASONS FOR GRANTING THE WRIT

I. THE SCOPE OF SPEECH AND CONDUCT PROSCRIBED BY THE UCL IS OVERBROAD.

It is difficult to imagine a statute more overly broad in its sweep of protected as well as unprotected speech or conduct than the UCL. Only by arbitrarily categorizing the

"speech" by Nike in this case as "commercial" and thus entitled to lesser protection than "non-commercial" speech, could the California Supreme Court majority shut its eyes to the reality that this application of the UCL inhibits, at the very least, a substantial amount of protected speech. (*Houston v. Hill* (1987) 482 U.S. 451, 458.) Given the consistently expansionist judicial gloss placed on the UCL over the past quarter century, however, its resulting overbreadth was predictable.

The precursor to today's UCL was former Civil Code section 3369, which originally read: "Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case." In 1933, the Legislature created the modern UCL by expanding section 3369's exception for nuisance cases to include unfair competition cases. The 1933 amendment to the statute provided injunctive relief from unfair competition and defined "unfair competition" to include "unfair or fraudulent business practice" as well as false advertising.

In 1963, the Legislature further broadened section 3369 by adding in the disjunctive the word "unlawful" to the types of wrongful business conduct that could be enjoined as unfair competition. According to the author of this legislative change, its purpose was "to clarify the statutory definition of unfair competition."[9] The one page "Report on Assembly

[9] Letter of Assemblyman Philip L. Soto to Governor Edmund G. Brown re: Assembly Bill 2929, dated July 10, 1963 and enclosing memorandum of Charles A. James, Assistant Attorney General re: AB 2929. The two page memorandum from Charles A. James, dated June 14, 1963 and written on Department of Justice letterhead, states, in relevant part:

> [T]he word "unlawful" is inserted in the definition to clarify the statutory definition of "unfair competition" to concur with judicial trends.

Bill 2929" from the Legislative Counsel dated July 1, 1963 merely states that the bill "[a]dds to the definition of the term 'unfair competition' for purposes of granting specific or preventive relief, 'unlawful' as well as unfair or fraudulent business practice and unfair, untrue or misleading advertising." Thus it appears from all available legislative history that the purpose of this amendment was to provide an injunctive remedy for the common law prohibition against "unfair competition" that was not necessarily "fraudulent," but did *injure* law abiding competitors (i.e., funeral homes that obeyed zoning ordinances).

Despite this modest beginning, a series of judicial interpretations have given a broader meaning to the 1963 amendment than it legislative history suggests was intended. The first opinion to do this was *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, a case that came before

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The case of *Stockton v. Frisbie & Latta* (1928) 93 Cal.App. 277, enunciated the principle that an unlawful act (here a violation of the zoning ordinance) is a proper subject of injunction. Although the courts have consistently held that the Attorney General has the authority to enjoin unlawful acts [citations] it is clear that the legislature intended the control of unfair competition by the procedure set forth in section 3369. It is not altogether clear that an individual acting in his own interest can find the relief ostensibly afforded him by the provisions of the section unless he shows the act of unfair competition to be fraudulent. . . . Inasmuch as the Legislature has seen fit to extent (sic) remedies to all persons who wish to correct acts of unfair competition, such acts should be clearly defined in the statute so that individuals as well as the Attorney General can be assured of prompt and effective remedy against unlawful acts which may not fall within the definition of fraudulent practices.

the state supreme court on a demurrer sustained to a UCL complaint against a collection agency for filing small claims court actions in improper counties to impair its adversaries' ability to defend themselves. In a unanimous opinion, the court acknowledged that as "originally enacted" in 1933 the UCL defined "unfair competition" only in terms of "unfair or fraudulent business practices"; and conceded that court opinions had interpreted the "essence" of the UCL "as the protection from any conduct likely to deceive the consumer." (*Id.* at 111.) *Barquis* stated that the 1963 amendment, about which it felt the legislative history was "not particularly instructive" *(id.* at 112) and which it did not discuss, intended by the "sweeping language" of "unlawful, unfair *or* deceptive business practice" to "permit tribunals to enjoin on-going *wrongful* business conduct in *whatever context such activity might occur.*" (*Id.* at 111.)

Barquis was followed by *People v. McKale* (1979) 25 Cal.3d 626, where a district attorney sued a mobile home park under the UCL. The complaint alleged that the UCL had been violated because the Mobilehome Parks Act and various other sections of the Administrative Code made the particular business procedures adopted by the mobile home park unlawful. In opposition, the mobile home park argued that the Commission on Housing and Community Development, an administrative agency, was the only entity authorized to enforce the Mobilehome Parks Act and the other related sections of the Administrative Code; thus, precluding prosecution by the district attorney. The Court disagreed and held that the district attorney had authority to bring suit under the UCL because "an unlawful business practice includes anything that can properly be called a business practice and that is at the same time forbidden by law." (*Id.* at 632.)

Then came *People v. E.W.A.P.* (1980) 106 Cal.App.3d 315, which extended the reach of unlawful

business practices to include a violation of a penal statute. The defendant in *E.W.A.P.* was a California corporation with its principal place of business in Chatsworth. It was alleged by the district attorney that defendant E.W.A.P. had been engaged in commercially distributing and possessing for commercial distribution "obscene" materials in violation of Penal Code §311.2.[10] The appellate court held that the district attorney could maintain an action under the UCL for violations of the Penal Code because the activity was "unlawful." (*Id.* at 318-319.) Furthermore, the court found that defendant E.W.A.P.'s activities were "business practices" because they were engaged in "commercial" distribution or possession for "commercial" distribution of obscene matter over a period of approximately a year. (*Id.*)

While *McKale* and *E.W.A.P.* were public enforcement actions by district attorneys of, respectively, an administrative regulation and a penal statute, they paved the way for yet another expansion of the UCL: a *private enforcement* action based upon a violation of state law. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197 involved a challenge by consumers to the marketing and advertising of sugared breakfast cereals that the plaintiffs contended were not really "cereals" but sugar products. Besides the UCL, plaintiffs' complaint referred to a cause of action based upon the state's Sherman Food, Drug and Cosmetic Law, which provided that "[i]t is unlawful for any person to disseminate any false advertising of any food, drug, device, or cosmetic." (Cal. H & S C § 26460.) The defendant challenged plaintiffs' right to bring a private enforcement action under the Sherman Food, Drug and

[10] Apparently, the district attorney prosecuted E.W.A.P. civilly under the UCL, as opposed to criminally under Penal Code §311.2, because of the remedies offered by the UCL. Specifically, injunctive relief and restitution.

Cosmetic Act, which the court conceded did "not expressly provide for private enforcement." (*Id.* at 210.) Yet the court said that the question "whether a private right of action should be implied under this statute . . . is immaterial since any unlawful business practice . . . may be redressed by a private action charging unfair competition in violation of [the UCL]." (*Id.* at 210-211.)

Not surprisingly, the disjunctive nature of the terms "unfair" or "unlawful" in the UCL eventually led to the judicial conclusion that a practice could be *lawful*, but still proscribed because it was "*unfair*." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163.) Thus there are two major independent prongs to the UCL – "unfair" or "unlawful" – to which a multitude of other laws can be "bootstrapped" and become the predicate for UCL enforcement. Under the "unlawful" prong it is now permissible for almost any other law – "be it civil or criminal, federal, state, or municipal, statutory regulatory, or court-made"[11] – to secure a "toehold" and be enforced through the remedies available under the UCL. Even violation of a court order has been enforced by the UCL's injunctive remedy, permitting the plaintiff to bypass contempt proceedings. (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 533.)

The "unfairness" prong offers even more creative possibilities. Thus far it has been interpreted to mean "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws,"[12] and to also prohibit the insertion of "unconsionable" provisions in contracts (*Olson v. Breeze, Inc.* (1996) 48

[11] *Saunders v. Superior Court* (1994) 27 Cal. App. 4th 832, 838-839.

[12] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., supra*, 20 Cal.4th at 187.

Cal.App.4th 608.) But why not equate "unfair" with, or "bootstrap" to that prong, the "due process" guarantee of the Constitution, which is often itself viewed as synonymous with "fundamental fairness"? (See *In re Sade* (1996) 13 Cal.4th 952, 966.) This way a lawyer cum social engineer can incorporate and make applicable to private persons the Bill of Rights without paying homage to the necessity of "state action." This is not far fetched, but a logical consequence of the seemingly inexorable expansion of the UCL by the courts.

Over the years the variety of activities swept within the UCL's proscriptive prongs has grown to include the sale of whale meat contrary to the Penal Code,[13] the filing of small claims court lawsuits by a collection agency in improper counties,[14] the use of the "Joe Camel" caricature in the advertising of cigarettes because of its likely influence on minors,[15] the sale by convenience stores of cigarettes to minors in violation of the Penal Code,[16] and the marketing and advertising of sugared cereals which, while labeled "cereals," were allegedly "sugar products or candies."[17] Is it any wonder that from this amorphous collection of holdings a court would cobble together the instant case: a business found facially liable under the UCL because it publicly defends itself against what it feels are unfounded attacks on its overseas operations? At this pace it will not take long, unless this Court acts to tether the UCL to some "bright line" parameters, before we see various provisions of the Constitution enforced against private parties absent any "state

[13] *People v. Sakai* (1976) 56 Cal.App.3d 531.

[14] *Barquis v. Merchants Collection Assn.*, *supra*, 7 Cal.3d 94.

[15] *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057.

[16] *Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*. 17 Cal.4th 553.

[17] *Committee on Children's Television, Inc. v. General Foods Corporation*, *supra*, 35 Cal.3d 197.

action," which is just another way of warning that Big Brother, in the form of the UCL, is knocking on our doors.[18]

Significantly, when the California Supreme Court was recently presented with yet another opportunity to retreat from the expansive gloss it had placed on the sweep of the UCL by deciding that a private enforcement action should not be permitted of a penal statute, it declined to do so, stating that "had the Legislature at any time desired to change the UCL so as to restrict its application . . . [after judicial opinions expanded it], it undeniably has had ample time to do so." (*Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal4th at 563.) The dissenting opinion remarked about this that "[o]ne need only read the daily newspapers to see how much easier it is to stall legislation than to enact it; how much simpler to expand what exists than to contract it. Courts can take advantage of this political infirmity by calling it 'acquiescence.'" (*Id.* at 598, dissenting opn. of Brown, J.)

No other state has vested its unfair competition laws with the stellar reach of California's UCL. They have, in fact, avoided California's extrapolation to the stars when it comes to defining the reach of their laws prohibiting unfair competition. Delaware, for example, has codified the common law of unfair competition for which it provides an extensive list of proscribed practices, focusing on unreasonable or unfair interference with the "horizontal" relationships between various business interests. (See 6 Del. C. §§ 2531-2536; *Grand Ventures, Inc. v. Whaley* (Del. 1993) 632 A.2d 63.) Illinois is similar. (815 ILCS 510/1 et. seq.; 720 ILCS 295 et. seq.) The District of Columbia's

[18] "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of . . . law and avoids the imposition of responsibility on a state for conduct it could not control." (*Morse v. Republican Party of Virginia* (1996) 116 S. Ct. 1186, 1220.)

statute against false or deceptive advertising prohibits any false advertisement that is made, in contrast to California's strict liability approach, with the *intent* to sell goods, to induce any person to purchase property, or to induce any person to employ another's services for a valuable consideration. (D.C. Code Ann. § 22-1511; *Green v. United States* (D.C. 1973) 312 A.2d 788, 789-90.) Indeed, a comprehensive review of all the states with laws against unfair competition and false advertising, reveal none as far reaching as California's UCL. When some facially appear to cover, like the UCL, the gamut of all possible human activities, brakes have been placed on them through restrictions on standing or who may prosecute actions under them, something the UCL totally lacks.

II. THE UCL IS UNIQUE IN COMPARISON TO ANALOGOUS LAWS OF OTHER STATES IN THAT ANYONE MAY SUE UNDER IT REGARDLESS OF WHETHER THAT PERSON HAS BEEN HARMED OR MISLED BY THE CHALLENGED CONDUCT.

When *Barquis* expanded the ambit of conduct that came within the UCL's proscription, it also relaxed any "standing" requirements under it, effectively enlarging the universe of those who could prosecute a UCL action to anyone with a gripe. That opinion concluded that Business and Professions Code section 17204 authorized prosecutions by "the Attorney General [and other public attorneys] . . . *or* by any person acting for the interests of itself, its members or the general public." (*Barquis*, *supra*, 7 Cal.3d at 109, italics added.) It reached this conclusion, which it felt "clear," from the plain language of the statute.[19] The dissent in *Stop Youth*

[19] Section 17204 provides: "Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent

Addiction pointed out that this reading of the statutory language runs "afoul of significant grammatical impediments," including making "the main clause superfluous and fail[ing] to account for other language in the statute – 'in the name of the people of the State of California,' 'upon the complaint of,' and 'exclusively.'" (*Stop Youth Addiction v. Lucky Stores, Inc.*, *supra*, 17 Cal.4th at 586-587, dissenting opn. of Brown, J.) Taking account of those grammatical considerations in parsing the meaning of the statute would produce "a narrower reading" – "one that channels UCL litigation through government prosecutors who file actions in the name of the people [and] . . . would explain why the drafters failed to insert *any* qualification on standing. Indeed, this 'gatekeeper' construction of the text is the only one consistent with rudimentary notions of procedural fairness." (*Id.* at 587.)

Other states have confined their unfair competition and unfair trade practice laws, or at least some of the remedies available under those laws, to enforcement by public prosecutors, or at least give public prosecutors the first chance to consider whether to challenge the complained of conduct. This furthers a more uniform and balanced

jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public."

enforcement approach of the law because the prosecutorial discretion of public lawyers, in contrast to the unfettered and unchecked appetites of too many fee motivated private counsel, are "curbed by established notions of ethical responsibility" and "political accountability." (*Id.* at 592.) Thus numerous states require proof of individualized harm or reliance for *private* enforcement actions under their unfair competition or false advertising laws, but relax that requirement when suit is brought by a public prosecutor.[20] Some states, of course, restrict enforcement of their unfair trade practices laws to public prosecutors.[21] Still others limit restitutionary relief under their laws to suits brought by the Attorney General.[22]

Nonetheless, California's high court holds in favor of *universal* standing and emphasizes that "any unlawful business practice . . . may be redressed by a private action" under the UCL. (*Id.* at 561-563.) This effectively means the UCL is completely disconnected from any notion, not only of competitive harm, but any injury at all. Omission of the requirement that a plaintiff show actual harm from the conduct challenged invites litigation that is not genuine and should not be filed. The requirement that a litigant show

[20] See, e.g., Colo. Code § 6-1-113, *Hall v. Walter*, 969 P.2d 224, 235 (Co. 1998) (en banc), *May Dept. Stores Co. v. State*, 863 P.2d 967, 972-73 (Co. 1993) (en banc); Fla. Code Ann. §§ 817.41, 501.204, *Himes v. Brown & Secs. Corp.*, 518 So. 2d 937, 938 n.1 (Fla. Dist. Ct. App. 1987) (per curiam). These features and others showing how the UCL differs from analogous laws of other states are found in the chart attached hereto as an Appendix.

[21] Iowa Code § 714.16(7); Minn. Stat. §325F.67 ("The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general.").

[22] E.g, Alaska Stat. § 45.50.501(b); Ohio Rev. Code Ann. § 1345.07(F) (Attorney General expressly authorized to seek restitution.).

actual, individualized injury "prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders"; "pleadings must be something more than an ingenious academic exercise in the conceivable." (*United States v. SCRAP* (1973) 412 U.S. 669, 687, 688.)

The UCL not only omits any requirement of standing to prosecute conduct under it, it goes further and effectively strips away whatever standing requirements apply to the predicate statutes that are bootstrapped to the UCL for enforcement. Thus in *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1337 a citizens group sued for housing discrimination under specific statutes prohibiting discrimination and the UCL. When the plaintiff organization could not demonstrate that any one member had been refused housing at defendant's apartments or even wanted to live there, the appellate court held that they lacked standing under the pertinent housing discrimination statutes, but avoided that problem by attaching and enforcing them through the UCL, which has no standing requirement. (*Id.* at 1393.)

The elimination of any requirement that a plaintiff prosecuting under the UCL demonstrate tangible injury is unique to California. The overwhelming majority of other state laws on unfair competition and false advertising require actual injury, monetary damage, causation or something specific besides the mere denunciation of defendant's conduct, somewhere, somehow, by someone, as "unlawful" or "unfair." These standing requirements, of course, serve to distinguish a genuine lawsuit from a contrived or frivolous one.[23] They also allow, as Petitioner points out, for the

[23] See Appendix herein of state laws analogous to the UCL showing why respondent would be unable to prosecute his claim in each of those states.

removal of suits asserting these rights to federal court, something that cannot be done when, as here, plaintiff disavows any injury essential to make a claim cognizable in federal court.[24] Elimination of the "actual injury" requirement under a law as expansive in its reach as the UCL not only encourages social reformers without real clients to misuse the courts and bypass the more representative and political branches of government to get what they want, it invites litigation primarily to collect attorney fees.[25] This does not further the public interest, but subverts it for the benefit of a few.

CONCLUSION

For all the aforementioned reasons, as well as the reasons articulated by petitioner, certiorari should be granted.

Respectfully submitted,

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[24] Petition, p. 29.

[25] A recent news article accurately described the inevitable consequence of marrying the omnivorous UCL with ambitious lawyers desirous of reaching out and touching someone with a lawsuit to obtain an attorney fee. "They blanket the business world with hundreds of lawsuits at a time, often making claims that appear fanciful, even absurd. Most of the cases never get to trial. The lawyers make their money on settlements paid by defendants who just want to make the suits go away. The amounts typically are modest – from $2,000 to $50,000 – but they add up." (Monte Morin, *Lawyers Who Sue to Settle*, LOS ANGELES TIMES, Oct. 26, 2002, Pt. 1, p. 1.)

APPENDIX A

Unfair Trade Practice Laws and False Advertising Laws

Chart I: Assessing the Reasons Why Kasky's Claim Would Fail in Each Respective State

State	Unfair Trade Practice Law	False Advertising Law
Alabama	**No injury;** Monetary damage to consumer is required - private right of action depends on whether plaintiff suffered any monetary damages as a result of the defendant's actions. See, Billions v. White & Stafford Furn. Co., 528 So. 2d 878 (Ala. Civ. App. 1988).	**No private action, no product reference** (the false or misleading statement must be made in connection with the promotion of a sale – § 13A9-42)
Alaska	**No injury (required for damages);** Harm (but not actual monetary damages) is required to recover damages under §45.50.531(a). **Not a "victim" (required for injunctive relief):** "any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction." Alaska Stat. §45.50.535(a)	No separate FAL
Arizona	**No injury:** Arizona provides an implied private right of action for compensatory and punitive damages, *Dunlap v. Jimmy GMC, Inc.*, 666 P.2d 83, 87 (Ariz. Ct. App. 1983), and thus likely for injunctive relief as well. To state such a claim, the plaintiff must prove (1) a misrepresentation and (2) the plaintiff's consequent and proximate injury. *Id.*	**No private cause of action** (§44-1481, See, Ward v. Fireman's Fund Ins. Co., 152 Ariz. 211, (Ct. App. 1986). **No product reference** (must make misleading misrepresentation of the product - §44-1481(a)(1).)
Arkansas	**No injury;** "Any person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney's fees." Ark. Code Ann. § 4-88-113(f)	No separate FAL
Colorado	**No injury; not an actual/potential consumer:** "An action under this section shall be available to any person who: Is an actual or potential consumer of the defendant's goods, services, or property and is injured as a result of such deceptive trade practice." Col. Gen Stat. **§6-1-113(1)(a)**	**No private cause of action** (criminal code - §18-5-301)
Connecticut	**No injury;** person "must suffer ascertainable loss of money or property as a result of the act or practice" of the company. Conn. Gen. Stat. §42-110g(a)	No separate FAL
Delaware	**No likelihood of injury:** only person "likely" to be damaged by a deceptive trade practice can bring suit. Title 6 Del Code Ann. §2533(a)	**No private cause of action** (criminal code - Del Code Ann. §906)
Florida	**No injury:** action must be "brought by a person who has suffered a loss as a result of a violation." Fla. Stat. Ann. §501.211(2)	**No private cause of action** (criminal code Fla. Stat. Ann. §817.40-47)
Georgia	**No likelihood of injury;** "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it ... Proof of monetary damage, loss of profits, or intent to deceive is not required." §10-1-373. **Injunction is only remedy:** *Id., See also, Lauria v. Ford Motor Co.*, 169 Ga. App. 203, 312 S.E.2d 190 (1983) (The "sole remedy provided under this section is injunctive relief.").	**No private cause of action** (criminal code §10-1-421)

Hawaii	**If no injury, only injunction available:** Hawaii amended its deceptive practices statute in June to allow "[a]ny person [to] bring an action based on unfair methods of competition." Haw. Stat. Ann. § 480-2(e). But the standing limits on seeking private remedies survive this amendment: only people "injured in [his or her] business or property," *id.* § 480(a), or suffering other "injur[y]," *id.* § 480-13(b) can take advantage of Hawaii's remedies.	**No private cause of action;** (criminal code Haw. Stat. Ann. §708-871) **No product reference;** "false advertising if in connection with the promotion of the sale" Haw. Stat. Ann. §708-871.
Idaho	**No purchase; no ascertainable injury**: "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this act, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages." Idaho Code § 48-608(1).	No separate FAL
Illinois	**No injury;** "Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper." **815 ILCS § 505/10a.**	**No private cause of action** (criminal code 720 ILCS §2951/a)
Indiana	**No reliance; No injury;** "A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act." IC §24-5-0.5-3(a).	**No private cause of action** (criminal code IC 35-43-5-3)
Iowa	**No private cause of action;** act is enforced by AG (Iowa Code §714.16(15))	No separate FAL
Kansas	**No injury:** only a consumer who is "aggrieved by an alleged" deceptive act can bring suit – "Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action." Kan. Stat. Ann. §50-634(a)	No separate FAL
Kentucky	**No injury; no purchase; no reliance**: "Any person who purchases ... goods or services ... and thereby suffers any ascertainable loss of money or property ... as a result ... of a method, act or practice declared unlawful ... may bring an action." Ky. Rev. Stat. Ann. §367.220	**No private cause of action** (criminal code Ky. Rev. Stat. Ann.§517.030)
Louisiana	**No financial injury; representative capacity not allowed:** "Any person who suffers any ascertainable loss of money or movable property... as a result of ... an unfair or deceptive method... may bring an action individually but not in a representative capacity to recover actual damages." § La. R.S. 51:1409(a)	No separate FAL

Maine	**No purchase; no injury;** Any person who purchases or leases goods... and thereby suffers any loss of money or property, ... as a result ... of a method, act or practice declared unlawful ... may bring an action ... for actual damages, restitution and for such other equitable relief, including an injunction." Me. Rev. Stat. Ann. tit. 5 §213). See also Me. Rev. Stat. Ann. tit. 10 §1213 (injunction only is available under this section)	**No private cause of action** (criminal code Me. Rev. Stat. Ann. tit. 17-A §901)
Maryland	**No injury:** "Any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Md. Code Ann. Comm. Law I § 13-408(a)	**Not material/no product reference;** "To determine if an advertisement is misleading, the following... shall be considered: (2) The extent to which the advertisement fails to reveal a fact which ... is material with respect to the advertised commodity." **No private cause of action** (criminal code, Md. Code Ann. Comm. Law I §11-704)
Massachusetts	**No injury; no causation:** Any person ... who has been injured by another person's use or employment of any method, act or practice declared to be unlawful ...may bring an action in the superior court... for damages and such equitable relief, including an injunction." 93A MGL §9(1)	**No private cause of action** (criminal code 266 MGL §91)
Michigan	**No injury;** "a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages" Mich. Stat. Ann. §445.911(2)	**No injury; no reliance** "a person who suffers loss as a result of a violation of this act ... may bring an individual or a class action to recover actual damages" Mich. Stat. Ann. §445.360(2)
Minnesota	**No injury/ likelihood of injury (injury is required when seeking damages, likelihood of injury is required for injunction)** See: *Group Health Plans v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) and Minn. Stat. §325D.45 ("A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required.")	**Enforced by the AG:** "The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general" – Minn. Stat. §325F.67
Mississippi	**No purchase; no injury;** "Any person who purchases or leases goods or services ... and thereby suffers any ascertainable loss of money or property, ... as a result ... of a method, act or practice prohibited by Section 75-24-5 may bring an action ... to recover such loss of money or damages for the loss of such property." Miss. Code. Ann. §75-24-15(1)	**No private cause of action** (criminal code Miss. Code. Ann. §97-23-1)

Missouri	**No purchase; no injury;** "Any person who purchases or leases merchandise ... and thereby suffers an ascertainable loss of money or property... as a result ... of a method, act or practice declared unlawful by section 407.020, may bring a private civil action ... to recover actual damages." Mo. Rev. Stat. § 407.025(1)	**No private cause of action** (criminal code Mo. Rev. Stat. §570.160)
Montana	**No purchase; no injury/loss** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, ... as a result of ... a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action." Mt. Stat. §30-14-133(1)	**No private cause of action** (criminal code Mt. Stat. §45-6-317)
Nebraska	**No injury:** "Any person who is injured ... may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both." Neb. Rev. Stat. Ann § 59-1609. Only equitable relief is available under the Uniform Deceptive Trade Practices Act; money damages cannot be recovered. See Al'Amin v. McDonalds Corp., -- F. Supp. 2d --, 2001 U.S. Dist. LEXIS 14274, (D. Neb. 2001).	**No private cause of action** (criminal code Neb. Rev. Stat. Ann §28-1476)
Nevada	**Not a victim; no equitable relief:** " An action may be brought by any person who is a victim of consumer fraud. (3) If the claimant is the prevailing party, the court shall award him: (a) Any damages that he has sustained; and (b) His costs in the action and reasonable attorney's fees. Nev. Rev. Stat. Ann. §41-600(3)	**No private cause of action** (criminal code Nev. Rev. Stat. Ann. §207.171)
New Hampshire	**No injury:** "Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper." N.H. Rev. Stat. §358-A:10(I)	**No private cause of action** (criminal code N.H. Rev. Stat. §638:6)
New Jersey	**No loss/injury:** "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of ... any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action ... in any court of competent jurisdiction." N.J. Stat. Ann § 56:8-19	No separate FAL

New Mexico	**No likelihood of injury (likelihood of harm required for injunction); equitable relief limited to injunction:** "A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required." §57-12-10(a). **No monetary loss (loss required for damages);** "Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages." N.M. Stat. Ann. § 57-12-10(b)	**Not material, no product mention.** (N.M. Stat. Ann. §57-15-2)
New York	**No injury;** "Any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice an action to recover his actual damages, or both." NY CLS Gen Bus §349(h)	**No private cause of action** (criminal code NY CLS Gen Bus **§190.20)**
N. Carolina	**No injury;** "If any person shall be injured ... by reason of any act or thing done ... in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done." N.C. Gen. Stat. §75.16	**No private cause of action** (criminal code N.C. Gen. Stat. §14-117)
N. Dakota	**No private cause of action:** See *Trade 'N Post, L.L.C. v. World Duty Free Ams.*, Inc., 2001 ND 116, 628 N.W.2d 707 (2001). (The state UTP (§51-10) does not contain a **private** right of action for damages for violations given the legislature's failure to expressly provide one).	**No injury;** See *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989) (One injured by a violation of the false advertising statutes (§51-12-01, 51-12-08) may bring an action to recover damages).
Ohio	**No likelihood of injury; only injunctive relief is available:** "A person who is likely to be damaged by a person who commits a deceptive trade practice ... may commence a civil action for injunctive relief." Ohio Rev. Code Ann. §4165.03(a)(1)	No separate FAL

Oklahoma	**No injury (injury required for damages):** "The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer. Title 15 Okl. St. § 761.1(A) **No likelihood of injury (likelihood of injury required for injunction); equitable relief limited to injunction:** "Any person damaged or likely to be damaged by a deceptive trade practice of another may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such deceptive trade practice. Proof of actual monetary damages, loss of profits or intent shall not be required. If in such action damages are alleged and proved, the plaintiff, in addition to injunctive relief, shall be entitled to recover from the defendant the actual damages sustained by the person. 78 Okl. St. § 54(A) (2002)	**No private cause of action** (criminal code 21 Okl. St. §1502)
Oregon	**No injury/ascertainable loss:** "Any person who suffers any ascertainable loss of money or property ... as a result of ... a method, act or practice declared unlawful ... may bring an individual action in an appropriate court." §646.638(1)	No separate FAL
Pennsylvania	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... of a method, act or practice declared unlawful ... may bring a private action to recover actual damages." §201-9.2(a)	No separate FAL
Rhode Island	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... a method, act, or practice declared unlawful ... may bring an action." Or. Rev. Stat. 6-13.1-5.2(a)	**No private cause of action** (criminal code Or. Rev. Stat. §11-18-10)
S. Carolina	**No injury; no representative capacity** "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of ... an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. §39-5-140(a)	No separate FAL
S. Dakota	**No injury; no remedy available other than actual damages;** "Any person who claims to have been adversely affected by any act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." S.D. Codified Laws §37-24-31	**No product reference** (statement must be "regarding merchandise"); **no private cause of action** (criminal code S.D. Codified Laws §22-41-10)

Tennessee	**No injury/ascertainable loss for actual damages:** "Any person who suffers an ascertainable loss of money or property, ... as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages." Tenn. Code Ann. §47-18-109(a)(1) **Plaintiff must be "affected" to get injunction; no restitution is available:** "anyone affected by a violation of this part may bring an action ... to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part. Tenn. Code Ann. §47-18-109(b)	**No private cause of action** (criminal code Tenn. Code Ann. §39-14-127)
Texas	**Not a consumer/no purchase; no injury; no reliance:** "A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is... relied on by a consumer to the consumer's detriment." Texas Bus & Com Code §17.50(a)	**Not material; no product reference** ("A person commits an offense if ... he intentionally (12) [makes] a materially false or misleading statement in an advertisement for the purchase ... of property or service." §32.42(12)(a)) **No private cause of action** (criminal code)
Utah	**No loss suffered/injury (required for damages); no standing requirements for injunction; no restitution available:** "(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $ 2,000, whichever is greater, plus court costs. (3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter." (Utah Code Ann. §13-11-19(2)).	**No prior notice:** "Any person or the state may maintain an action to enjoin a continuance of any act in violation of [Utah's Truth in Advertising Act] and, if injured by the act, for the recovery of damages. ... (5) No action for injunctive relief may be brought for a violation of this chapter unless the complaining person first gives notice of the alleged violation to the prospective defendant and provides the prospective defendant an opportunity to promulgate a correction notice by the same media as the allegedly violating advertisement." (Utah Code Ann. §13-11A-4(a)) **Statements not advertising under act's definition:** ""Advertisement" means any written, oral, or graphic statement or representation made by a supplier in connection with the solicitation of business." (Utah Code Ann. §13-11a-2(a))

Vermont	**No reliance; no injury** "Any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 ... or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, ... may sue for appropriate equitable relief." 9 V.S.A. § 2461(b).	**No private cause of action** (criminal code 13 VSA §2005)
Virginia	**No injury/loss:** "Any person who suffers loss as the result of a violation of [UTP] shall be entitled to bring an individual action to recover damages. Va. Code Ann.§59.1-68.3	**No private cause of action** (criminal code Va. Code Ann. §18.2-216)
Washington	**No injury, no causal connection between injury and deceptive act:** "Any person who is injured in his or her business or property by a violation of [The UTP] ... may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both." (Rev. Code Wash. §19.86.090) See also *Northwest Strategies, Inc v. Buck Medical Servs., Inc.*, 927 F. Supp. 1343 (W.D. Wash. 1996) (The elements required to prove a violation of the UTP are: (1) defendant committed an unfair or deceptive act; (2) the act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) plaintiff's injury was caused by defendant's act). **No economic injury:** *See Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.2d 351, 359 (Wash. 2001) (en banc) (noting the need for individualized proof in statutory consumer fraud cases).	**No private cause of action** (criminal code Rev. Code Wash. §9.04.010)
W. Virginia	**No purchase, no ascertainable injury/loss:** "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article, may bring an action." § 46A-6-106(1).	No separate general FAL
Wisconsin	**No economic injury/loss:** "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court ... and shall recover such pecuniary loss, together with costs." Wis Stat. §100.18 11(b)(2)	No separate FAL
Wyoming	**Not a consumer, no injury/damages; no reliance; no equitable relief:** "A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice." Wyo. Stat. Ann. §40-12-108(a)	**No private cause of action** (criminal code Wyo. Stat. Ann. §6-3-611)

Supreme Court, U.S.
FILED
NOV 15 2002
CLERK

No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

18 pp

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; its letter of consent has been lodged with the Clerk of the Court. Counsel for Respondent declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in California. WLF regularly appears before federal and state

courts to promote economic liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting commercial speech rights, appearing before this Court in cases raising commercial speech issues. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 121 S. Ct. 2404 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed,* 202 F.3d 331 (D.C. Cir. 2000).

WLF fully supports Petitioners' request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the second Question Presented and the California Supreme Court's apparent willingness to tolerate legal regimes that are likely to have a significant chilling effect on speech relating to issues of considerable public interest. WLF believes that the public interest in the dissemination of such speech will be undermined if the decision below is permitted to stand; that public interest exists regardless whether the speech at issue is labeled "commercial" or "noncommercial."

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no interest, financial or other, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attach brief.

Respectfully submitted,

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November 15, 2002

QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Even assuming the California Supreme Court properly characterized the statements at issue in this case as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Petition for a Writ of Certiorari.

In brief, Petitioner Nike, Inc. is the world's leading athletic apparel and equipment manufacturer. It products are manufactured by subcontractors at more than 700 facilities around the world. During the past decade, numerous critics of Nike have alleged that workers at many of these overseas facilities have been subject to substandard working conditions. These allegations have been widely reported in newspapers and on television programs and have become an issue of significant public interest. Petition Appendix ("Pet. App.") 3a.

Nike has responded by denying the charges. These denials were disseminated in a variety of ways, including through press releases, letters to newspapers, and letters to university presidents and athletic directors. *Id.* 4a. Nike also took out full-page newspaper advertisements to publicize a report that concluded that there was no evidence of illegal or unsafe working conditions at Nike facilities in China, Vietnam, and Indonesia.

Some of the Nike denials reached consumers in California, including Respondent Marc Kasky. Kasky alleges that the denials were false, and that in disseminating them, Nike violated California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, and its false advertising law, Cal. Bus. & Prof. Code § 17500. He alleges that Nike made these false statements negligently and carelessly, Pet. App. 4a, and to induce consumers to purchase its products.

He does not claim to have been injured by Nike's statements, but he seeks injunctive relief -- including disgorgement of money earned due to the false statements -- and attorney fees.

The trial court sustained Nike's demurrer without leave to amend, holding that the complaint was barred by the First Amendment. The court held that Nike's denials constituted noncommercial speech and as such was protected under the First Amendment from the types of sanctions Kasky sought to impose. *Id.* 4a-5a, 80a. The California Court of Appeal affirmed. *Id.* 66a-79a.

By a 4-3 vote, the California Supreme Court reversed and remanded. *Id.* 1a-30a. Accepting as true the allegations of the complaint, the court determined that the Nike denials should be deemed commercial speech:

> Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception.

Id. at 23a. The court held that the Nike denials were not exempt from categorization as commercial speech simply because "they related to a matter of significant public interest or controversy." *Id.* Because it deemed the denials commercial speech and because Kasky alleged that the denials were false, the court held that the speech was not entitled to *any* First Amendment protection:

> [C]ommercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech restrictions.

Id. 27a. Reversing the decision to sustain Nike's demurrer, the court remanded the case to the Court of Appeal for further proceedings. *Id.* 30a.

REASONS FOR GRANTING THE PETITION

This case raises First Amendment issues of exceptional importance. There can be little doubt that the California Supreme Court's decision is chilling, and unless overturned will continue to chill, significant amounts of speech by corporations. The court expressed unconcern about such chilling effects, relying on statements by this Court that commercial speech is especially hardy and thus is unlikely to be chilled significantly by the sanctioning of false commercial speech.

But WLF ventures to guess that the Court never had in mind laws such as California's when it hazarded that assessment. As the decision below makes clear, it can often be very difficult -- both for corporations and courts -- to distinguish between commercial and noncommercial speech; that difficulty serves to magnify the chilling effect of the decision below. By permitting corporations to be haled into court and forced to defend their speech on matters of public concern based on an uninjured plaintiffs' mere belief that the speech is false, California has caused the entire business community to stand up and take notice. Business are likely to be far less willing to engage in such speech in light of those consequences. Even though the business may believe

that its speech is noncommercial, it may well be deterred from speaking by the fear that a reviewing court might reach the opposite conclusion.

Review is warranted in light of the profound impact the decision below is likely to have on the willingness of the business community to speak out on issues of public concern. The Court should consider whether the court below was correct in its determination that the First Amendment is indifferent to such impacts.

Review is also warranted because this case provides the Court with an excellent vehicle for re-examining the manner in which it addresses First Amendment protections for speech by commercial entities. In general, the Court has attempted to divide all such speech into one of two categories -- commercial and noncommercial -- and to allow that categorization alone to determine the level of First Amendment protection to be afforded.[2] That approach has been unsatisfying in several respects. First, as the Court has repeatedly conceded, there is no easy method by which commercial and noncommercial speech can be differentiated, yet the consequences of how the speech is classified are huge in terms of how far a State may go in regulating the speech. Second, allowing speech to be categorized in only two possible ways does not adequately take into account the numerous different forms that speech can take. WLF respectfully suggests that the Court grant review for the purpose of exploring alternative doctrines for determining the level of First Amendment protection to be afforded speech by

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[2] WLF agrees with Nike that the California Supreme Court erred in determining that the speech at issue here should be deemed commercial speech. But this brief does not focus on that issue.

commercial entities. In particular, the Court should consider whether to grant enhanced First Amendment protection to speech, regardless whether it is deemed commercial or noncommercial, if the speech address matters of significant public concern and/or the speech is neither a part of product labeling nor uttered for the *explicit* purpose of proposing a commercial transaction.

I. REVIEW IS WARRANTED BECAUSE OF THE SIGNIFICANT CHILLING EFFECT THE DECISION BELOW IS HAVING ON SPEECH BY COMMERCIAL ENTITIES ON ISSUES OF PUBLIC CONCERN

In the six months since the California Supreme Court issued its decision in this case, it has unquestionably succeeded in causing the business community to stand up and take notice. The decision has garnered widespread publicity and led to numerous warnings within the business community that commercial entities need to be much more careful in commenting on issues of public concern, in order to avoid potential liability in a California court. *See, e.g.*, "Swoosh Goes the First Amendment," *Wall Street Journal* (May 14, 2002) ("lawyers will counsel their business clients to withdraw from the public arena. lest they open themselves up to a lawsuit over an advertisement or op-ed article"); Clark S. Judge, "*Kasky v. Nike*: U.S. Supreme Court Review Can Protect Free Public Debate," Washington Legal Foundation *Legal Opinion Letter* (Sept. 20, 2002).

Nike in its petition has cogently explained all the reasons why the decision below is having a significant chilling effect on speech by commercial entities. Petition 23-30. WLF will not repeat that explanation here. The

California Supreme Court suggested that this chilling effect was actually a good thing:

> To the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by "insuring that the stream of commercial information flow[s] cleanly as well as freely." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra*, 425 U.S. [748] at pp. 772 [(1976)].

Pet. App. 22a.

That statement makes several erroneous assumptions. First, it simply is not true, as alleged by the court below, that multinational corporations such as Nike are "in a position to readily verify the truth of any factual assertions" it makes regarding the way that its workers are treated. *Id.* It is difficult enough for an American company to do a complete investigation and get to the bottom of, say, a sex discrimination claim raised by a worker in an American facility. It can be darned near impossible for the same company to get to the bottom of a similar claim raised by a worker in the Far East. Thus, while the court is correct that its ruling will likely cause corporations to be "more cautious" in commenting on issues of this sort, the inability of a company ever to satisfy itself with absolute certainly regarding such issues may well cause the company simply to say nothing. Second, the court's statement overlooks *any* company's natural fear that, no matter how satisfied it is that a statement is true, there is always the possibility that a reviewing court will reach the opposite conclusion -- thereby exposing the company to enormous liability and litigation

costs. If, as appears likely in this case, those fears cause a company to refrain from speaking out on issues it might otherwise have addressed, then the court's decision will not cause the stream of commercial information to run more clearly but rather to dry up.

In the end, the California Supreme Court simply assumed on faith that its decision would having little chilling effect on speech. The court reasoned:

> Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.

Pet. App. 22a. But the court's conclusion is far from self-evident: that based solely on the assumption that Nike seeks "to maintain its sales and profits," Nike will -- despite the court's opinion -- continue to conduct a public relations campaign regarding the conditions in its factories.[3] A company that seeks to increase its sales and profits can select from numerous options for achieving that goal. Corporate image advertising -- for example, an advertisement depicting a famous athlete working out while wearing clothing displaying the Nike insignia -- is one such option. Moreover,

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[3] Significantly, Nike states that it has determined that "the risk of suits in California asserting the *Kasky* theory is too great to release publicly anywhere in the world its next annual Corporate Responsibility Report, the company's single most important document describing its initiatives and progress on matters such as labor compliance, community affairs, sustainable development, and workplace programs." Pet. 28.

such advertising has as one of its greatest attractions the fact that, because it contains no statements of fact, it almost surely will not become the target of litigation. Accordingly, as California increases its constraints on corporations that seek to speak out on issues of significant public interest, such speech will be chilled as businesses turn to promotional techniques with fewer down sides.

The California Supreme Court also indicated its belief that this Court has determined *as a matter of law* that there is no danger that commercial speech will be significantly chilled by increased levels of speech restrictions. The court said:

> The reason that it is "less necessary to tolerate inaccurate statements for fear of silencing the speaker" of commercial speech is not that such speech concerns matters of lesser public interest or value, but rather that commercial speech is both "more easily verifiable by its disseminator" and "less likely to be chilled by proper regulation." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. at p. 772, fn. 24.

Pet. App. 24a.

WLF submits that this Court's statement regarding the greater hardiness of commercial speech in the face of speech restrictions was simply an observation based on the evidence available to the Court in the 1970s. It is highly unlikely that the Court anticipated California's significantly stepped-up regulation of commercial speech and the chilling effect that regulation has had on commercial speech throughout the country. It is also unlikely that the Court thought that the chilling effect would apply equally across the board to all types of commercial speech; the evidence cited by Nike, for

example, suggests that the effect is much more pronounced with respect to speech on matter of significant public concern than it is in other areas. Review is warranted both because the decision below is having such a large impact on speech by the business community and because it is having its greatest impact on the very type of speech society ought to be encouraging most: speech on issues of significant public concern.

II. REVIEW IS WARRANTED BECAUSE THE CASE PROVIDES AN EXCELLENT VEHICLE FOR RE-EXAMINING FIRST AMENDMENT PROTECTIONS FOR COMMERCIAL ENTITIES

This case well illustrates the inflexibility of the Court's current commercial speech doctrine. Once (as here) speech is deemed commercial in character, it is subject to a uniform, reduced level of First Amendment protection. That uniform level of protection applies regardless of the value society places on the speech at issue and regardless of its susceptibility to being chilled by government regulation. Many would argue that the speech being regulated in this case (a major corporation's response to attacks on its labor policies at plants throughout the world) is speech of great public importance and ought to be encouraged. But under the California Supreme Court's ruling, the speech is subject to the same level of First Amendment restrictions as a Nike advertisement stating the price and other terms of sale for a pair of running shoes. Granting review in this case would allow the Court to consider the appropriateness of applying factors other than the commercial speech/noncommercial speech distinction in determining the level of First Amendment protection to be granted speech by commercial entities.

Within the noncommercial speech arena there is precedent for basing the level of First Amendment protection on the public importance of the speech in question. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), this Court held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving wholly false speech where the defamatory statements do not involve *matter of public concern*, even in the absence of a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 755-61 (plurality).[4] The Court thus declined to extend its ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that a showing of "actual malice" was required before such damages could be awarded in libel cases in which the false and defamatory statements *did* involve matters of public concern. By granting review in this case, the Court could consider whether to extend the distinction between speech involving matters of public concern and speech not involving matters of public concern from the noncommercial speech arena to the commercial arena. Doing so would ensure greater First Amendment protection for *all* forms of speech (*i.e.*, both commercial speech and noncommercial speech) involving matters of public concern.

Granting review in this case would also allow the Court to consider whether to calculate the level of First Amendment protection afforded commercial entities based on whether the speech directly concerns the characteristics of a product or service. A State's interest in sanctioning false commercial speech undoubtedly is at its highest when the speech *does* directly concern the characteristics of the commercial

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[4] *Dun & Bradstreet* involved a credit report on a private entity that admittedly included false information.

speaker's product or service (*e.g.*, the price, efficacy, quality, value, or safety). It is precisely such speech that consumers are most likely to rely on when making purchase decisions. In contrast, the speech by Nike at issue in this case may have led consumers to feel more warmly about the company and ultimately more likely to purchase a Nike product, but it is highly unlikely that a consumer would rely on Nike's statements regarding its overseas labor record as his primary basis for buying a specific product. The unlikelihood of such reliance suggests that a greater level of First Amendment breathing room ought to be afforded to statements regarding labor record or similar statements regarding general company policy. WLF notes that Justice Brown, in her dissent from the decision below, suggested that this Court consider granting lower levels of First Amendment protection to speech by commercial entities that touches upon the characteristics of a product or service that the entity offers for sale. Pet. App. 62a (Brown, J., dissenting).

Finally, granting review in this case would allow the Court to consider whether to base the level of First Amendment protection on the proximity of the speech at issue to a specific sales transactions. Where there is close proximity -- for example, the speech at issue is on a product label or is part of an advertisement explicitly exhorting consumers to purchase a product -- there is greater reason for the Court to allow tighter State control over what the seller may say. In contrast, the Nike public relations materials at issue in this case were never disseminated in connection with any direct sales pitches -- suggesting that those materials should be given greater First Amendment protection. WLF notes, for example, that a federal district court has held that the First Amendment protects the right of a pharmaceutical company to send peer-reviewed medical journal articles to a

doctor, even though the articles contain discussion of unapproved uses for the company's product; but the court would *not* have upheld such a company's First Amendment right to insert the same journal article into a package containing drugs the company is trying to sell. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed*, 202 F.3d 331 (D.C.Cir. 2000).

On several occasions in recent years, various members of the Court have expressed dissatisfaction with the Court's current commercial speech doctrine. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Scalia, J., concurring). This case would provide the Court with an excellent vehicle for considering changes in that doctrine.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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Date: November 15, 2002

Supreme Court, U.S.
FILED
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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Because Respondent has refused to consent to the filing of *Amici*'s brief, *Amici* ABC, Inc.; American Booksellers Foundation for Free Expression; American Business Media; Association of American Publishers, Inc.; Belo Corp.; Bloomberg L.P.; CBS Broadcasting, Inc.; Cable News Network L.P. LLLP; The California First Amendment Coalition; California Newspaper Publishers Association; The Copley Press, Inc.; Ethical Corporation; Forbes, Inc.; Fox Entertainment Group, Inc.; The Hearst Corporation; Magazine Publishers of America, Inc.; The McClatchy Company; National Association of Broadcasters; National Broadcasting Company, Inc.; The New York Times Company; Newspaper Association of America; Newsweek, Inc.; PR Newswire Association LLC; Reed Elsevier Inc.; Reporters Committee for Freedom of the Press; The Seattle Times Company; Silha Center for the Study of Media Ethics and the Law at the University of Minnesota; Society of Professional Journalists; SRiMedia PLC; Time Inc.; Tribune Company; and The Washington Post Company, hereby move, pursuant to Supreme Court Rule 37.2(b), for leave to file an *amici curiae* brief in support of Nike, Inc., et al.'s Petition for a Writ of Certiorari. The brief *amici curiae* immediately follows this motion.

Amici are leading newspapers, magazines, broadcasters, internet providers and other media-related organizations and professional associations in California and the United States, as well as overseas. Most *Amici* or their members customarily report on issues concerning businesses' services and operations.

Amici share a common interest in enforcing the First Amendment's prohibition against governmental interference in public debates, even when those debates relate to corp-

orations. Indeed, many *Amici* are actively reporting on the globalization controversy that is at the center of this case, and most of Nike's communications to the press at issue here were sent to them. Because *Amici* believe that the California Supreme Court's extension of the "commercial speech" doctrine to such communications impermissibly threatens their ability to report on issues concerning corporate America, they respectfully seek leave to file a brief *amici curiae* in support of Petitioners.

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INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, and media-related organizations and professional associations in the United States and abroad.[1] They share an interest in enforcing the First Amendment's prohibition against governmental interference in public debates. Indeed, many *Amici* are actively reporting on the globalization controversy that is at the center of this case, and most of Nike's communications to the press at issue here were sent to them. Because the California Supreme Court's extension of the "commercial speech" doctrine impermissibly substitutes state regulation for traditional methods of media coverage and public debate, *Amici* respectfully submit this brief in support of the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The California Supreme Court's decision poses a serious and immediate threat to the media's ability to report on important issues regarding corporate America. Even a cursory review of prominent press coverage from the past few years reveals a vast array of corporate speech – on issues ranging from race discrimination to environmental sustainability to product health and safety – that would now be subject to California's new "commercial speech" dragnet. If the decision below is not reversed, business representatives will be deterred from speaking to the press about these and other public issues. This chilling effect will deprive the public of access to important information and the clash of competing viewpoints that undergirds the First Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

2. Extending the definition of commercial speech to corporate statements about publicly debated business operations also is unnecessary. When a business practice becomes a matter of public concern, the media scrutinize corporate speech and typically place potentially misleading statements into context. That is exactly what happened in this case. In these circumstances – when the press already provides consumers with competing information and time to reflect on it – the First Amendment prohibits states from making speakers on either side of the debate strictly liable for potentially deceptive or factually inaccurate statements.

I. THE CALIFORNIA SUPREME COURT'S DECISION, IF ALLOWED TO STAND, WILL INHIBIT THE MEDIA'S ABILITY TO REPORT ON ISSUES OF PUBLIC CONCERN REGARDING CORPORATE AMERICA.

A. The California Supreme Court's Definition of Commercial Speech Vastly Enlarges the Realm of Corporate Statements Subject to Regulation.

The scope of *Kasky*'s new definition of commercial speech is staggering. According to the California Supreme Court, speech is now "commercial" if it (i) is made by someone engaged in commerce "or someone acting on behalf of a person so engaged," Pet. App. 18a, such as an individual spokesperson or a trade association; (ii) is likely to reach potential buyers or customers; and (iii) involves descriptions of "business operations," employment or manufacturing policies, or other attempts to "enhance[] the image of [a company's] product or of its manufacturer or seller." Pet. App. 19a-20a. Petitioners amply explain why this test is inconsistent with this Court's precedent, *see* Pet. 10-15, but *Amici* wish to highlight three aspects of this new doctrine.

First, although this Court has "usually defined" commercial speech as that which "does no more than propose a

commercial transaction" to consumers, *United States v. United Foods*, 533 U.S. 405, 409 (2001), the California Supreme Court explicitly held that commercial speech includes statements directed solely to reporters or newspaper editors in their capacities as newsgatherers. Pet. App. 4a, 18a. The California Supreme Court thus ruled that a business may be sued for consumer protection violations based on answers given to reporters' questions, press releases, op-ed pieces or "editorial advertisements," regardless of whether the business's speech is printed or appears as part of a news story that includes opposing viewpoints.

Second, although this Court has held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values," *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quotation omitted), the California Supreme Court ruled that "it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate" on an issue of intense national and international interest. Pet. App. 25a. In the California Supreme Court's view, when public debate turns to a corporation's services or "business operations," the corporation, but not its critics, may be punished if its defense of its practices turns out to be false or misleading. Pet. App. 25a-27a. Indeed, under *Kasky*'s through-the-looking-glass view of commercial speech, the *more* intense the media debate is regarding a company's business practice, the *more* likely it is that a company's statements will be subject to regulation. This is because issues regarding a company's business operations that are hotly debated naturally are more likely to affect purchasing decisions and the company's bottom line, and thus the company's joinder in the debate is more likely to be motivated in part by a desire to "maintain[] . . . profits and sales." Pet. App. 25a.

Third, the California Supreme Court held that corporate communications to the media need not be false or even

purposely or negligently misleading in order to be actionable. Pet. App. 7a. The Court ruled that such speech is unlawful – regardless of the speaker's intent or the public's actual knowledge – if it is "actually misleading *or* [it] has a capacity, likelihood *or* tendency to deceive *or* confuse the public." Pet. App. 7a (quoting *Leoni v. State Bar,* 704 P.2d 183, 194 (Cal. 1985)) (emphasis added); *see also Cortez v. Purolator Air Filtration Prods.,* 999 P.2d 706, 717 (Cal. 2000) (strict liability for deceptive practice under unfair trade practices law); *Chern v. Bank of Am.,* 544 P.2d 1310, 1316 (Cal. 1976) (same under false advertising law). This standard seemingly holds businesses strictly liable for mere "spin." If an executive or trade association granting an interview portrays a controversial business practice in the most favorable light – perhaps by omitting certain background details – then the statements may well have a "capacity . . . to deceive or confuse the public," thereby making them unlawful. What is more, it makes no difference whether the resulting media story clarifies these corporate statements or combines them with other speakers' allegations to create a balanced news story. As evidenced by Respondent's allegations in this case, it is the corporation's raw speech that provides the basis for punishment under California law, regardless of whether the media repeat it or place it into context.

B. Application of These Expanded Consumer Regulations Will Impair the Media's Ability to Cover Numerous Issues of Intense Public Concern.

Accurate and useful reporting depends on considering all sides of an issue. When a public debate concerns a company's business operations, attaining such a complete picture requires newsgatherers to get information not only from interest groups and the company's detractors, but also from the company itself. The First Amendment's protection of the press, in fact, "rests on the assumption" that gathering and disseminating "information from diverse and

antagonistic sources" will best serve the public welfare. *Associated Press v. United States,* 326 U.S. 1, 20 (1945). Reporters who fail to obtain corporations' statements on issues involving their businesses may overlook key aspects of those issues, rendering their stories incomplete. Reporters may even shelve such stories for fear of publishing something that is too one-sided. At a minimum, news stories that fail at least to impart the view of each opposing party are more likely to be deemed untrustworthy or biased.

The *Kasky* decision will seriously hamper the media's ability to obtain these critical business-oriented statements. As a general rule, any law that "impose[s] strict liability on [speakers] for false factual assertions" regarding public issues has "an undoubted 'chilling' effect" on valuable speech. *Hustler Magazine v. Falwell,* 485 U.S. 46, 52 (1988); *accord New York Times Co. v. Sullivan,* 376 U.S. 254, 277-78 (1964). This Court has held that the threat of liability has the same effect in the corporate context. If states could punish corporate speech on any public issue that "materially affected" the company's profitability:

> [m]uch valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk [those penalties]. . . . In addition, the burden and expense of litigating the issue – especially when what must be established is a complex and amorphous economic relationship – would unduly impinge on the exercise of the constitutional right. [T]he free dissemination of ideas [might] be the loser.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 n.21 (1978) (quotation omitted). California's expansion of the commercial speech doctrine presents these same risks.

Because issues concerning companies' "business operations" are increasingly fundamental to the world's social and political landscape, the withdrawal of corporate voices on those issues from the media would deprive the public of vital information. Nike, for example, is not the only multinational corporation whose labor policies in third world countries have been the focus of public scrutiny. An executive from another company, Cutter & Buck, responded to allegations that its garments were made in overseas "sweatshops" by telling the media that "I have no objection to outside monitoring because I have every confidence our factories would pass." Les Blumenthal, *The News Tribune,* April 15, 1997, at B4. Labor organizations have sued the company, alleging that its executive's statement amounted to false advertising in the same way that Nike's speech did. First Amended Complaint ¶¶ 95 & 125, *Union of Needletrades Indus. & Textile Employees, et al. v. The Gap, Inc., et al.,* No. 300474 (Ca. Super. Sept. 23, 1999).

Media coverage of corporations' business operations, of course, goes far beyond labor policies in developing countries. Civil rights groups recently have alleged that several companies' practices of stocking different merchandise or requiring different forms of payment in predominantly minority communities amounts to invidious racial discrimination. When asked to explain why its "no check" policy appeared to be limited to stores in predominantly black neighborhoods, an executive for the parent company of KB Toys stated that despite using "check-acceptance services designed to screen for problem checks" in the pertinent stores, fraudulent check rates still "can be as high as 20 percent." Stephanie Stroughton, *Suit Alleges Bias by KB Toys,* Wash. Post, Dec. 16, 1999, at A1. Although facts like these are critical to the public debate over whether such retail "red-lining" practices are wrong and should be prohibited, the *Kasky* doctrine would hold that businesses contribute information to this debate at their own peril.

Similarly, it was accepted wisdom prior to *Kasky* that "[i]f a real scientific debate about the health impact of a product exists, the manufacturer would retain a fully protected [First Amendment] right to comment on that debate" outside of its direct advertisements and product labels, "even though the likely and intended impact of the comment on the listener would be the creation of a desire to purchase that product." Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech,* 43 Vand. L. Rev. 1433, 1453 (1990). A passage from a recent magazine cover story evinces this principle:

> David Ludwig, director of the Obesity Program at Children's Hospital in Boston, says his research shows that "for every additional serving of soft drinks a day, a child's risk of becoming obese increases by 60 percent." Ludwig's soft drink study also suggests that calories from sugar-sweetened drinks do not seem to be as filling as calories from other foods. Soon after Ludwig's results hit the media, studies paid for by the National Soft Drink Association used government data to show that soft drinks do not cause obesity. "If you go through all the scientific evidence, you see there is no link between consumption and obesity," says Sean McBride of the NSDA. . . . This debate is only the beginning.

Amanda Spake & Mary Brophy Marcus, *The Fattening of America,* U.S. News & World Report, Aug. 19, 2002, at 46.[2]

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[2] A similar debate is occurring in Oregon over a proposal to adopt a state law requiring labeling of genetically engineered foods. Interest groups supporting the initiative have asserted that food companies are creating "Frankenfood" – that is, "something we can't control" – and that they are "like little kids playing with a chemistry set in a back bedroom." Brad

Because food and beverage manufacturers' speech on health-related issues undoubtedly is in part driven by product image and economics, *Kasky* would restrict speech on one side of these disputes, thereby inhibiting the media's ability to compare both viewpoints in order to ferret out the truth.

There also is a heated public debate regarding sustainable environmental practices and whether people should support companies that harvest or treat natural resources in certain ways. Environmental groups, for instance, have called on consumers and chefs to boycott swordfish and sea bass on the ground that the seafood industry is over-fishing those species. But the industry says that boycotts are unnecessary because fishing companies' new, self-imposed quotas are sufficient to protect the ecosystem. Carolyn Jung, *Activists, Industry Debate Reason for Swordfish Comeback,* San Jose Mercury News, Oct. 16, 2002, at 1; Beth Daley, *Sea Bass Overfishing Tests Industry's Policing Ability,* Boston Globe, Aug. 21, 2002, at A1. Such give-and-take is critical to developing effective policies not only for oceans and rivers, but also for the world's forests and mines. *See, e.g.,* Glen Martin, *Redwood Logging Firm Recognized for Sustainable Practices,* S.F. Chron., Nov. 17, 2000, at A11; Terry McCarthy, *Plumbing the Pasture,* Time, July 16, 2001, at 22. Yet "as public concern about the environment grows, there is an increasing acceptance in executive suites that industrial reform" concerning a wide range of practices "can be good for the environment *and* good for profits." Eric Roston, *New War on Waste,* Time, Aug. 26, 2002, at A28 (emphasis added). Hence, the economic component of these sustainability debates apparently makes them subject to the *Kasky* doctrine.

Cain, *Labels for Genetically Altered Food Put to Vote,* Seattle Times, Aug. 12, 2002, at B2. A spokesman for food manufacturers responded that genetic alterations are "in all kinds of food, and there's never been a single case of illness or any other problem." *Id.*

Finally, some important public debates occur between two businesses. Last year, Bridgestone/Firestone alleged that "the real problem" in accidents involving Ford Explorers derived from unsafe vehicles, while Ford "vehemently insist[ed] it [was] a tire problem." Terril Yue Jones, *Bridgestone Rejects Wider Recall Request,* L.A. Times, July 20, 2001, at B1. Although these companies' public descriptions of their safety tests were driven partly by a desire to protect their profitability, *id.*, they also imparted vital information to consumers in the automotive market. Under *Kasky,* however, such differing corporate statements provide fodder not only for tort lawsuits, but for "false advertising" claims as well. This type of threat may well deter the release of contemporaneous safety-related information the next time around, perhaps regarding air travel. *See* Sally B. Donnelly, *Just Plane Dangerous,* Time, Aug. 13, 2001 (dispute between airline and its repair company). Even if a company honestly believes its contested practice is safe or lawful, the prospect of immediate nuisance lawsuits – not to mention additional *Kasky*-based claims if a jury later disagrees with the company's public assessment of its practice, *see* Pet. App. 22a – could be too high a price to pay for defending it in the media.

There can be no doubt, in sum, that *Kasky* threatens to transform the way that the media report on a vast array of public issues. Businesses, big and (perhaps even more so) small, will be deterred from speaking on issues concerning their operations, or they will offer only bland, indisputable claims. Spontaneous interviews also will be far less informative, for any alert business will rely on carefully crafted statements designed to keep it out of court. When newsworthy companies are themselves media entities – such as AOL Time Warner, the ultimate parent of *Amicus* CNN – the *Kasky* decision presents still more difficulties, for such media organizations will potentially be subject to legal claims arising out of their coverage that their competitors will not. The result of all this will be far less public information

regarding corporate issues, to the detriment both of businesses' supporters and their critics.

The reverberations of this information withdrawal will be felt not only in this country, but abroad as well. Many European countries encourage, and France requires, corporations to disclose information detailing their various social and environmental practices. European media entities such as *Amici* SRiMedia and *Ethical Corporation* magazine collect these "corporate social responsibility" reports, and publish evaluations of them to assist overseas investment funds and individuals in putting their money into sustainable and responsible companies. *See* App. 4a, 8a. The chilling effect of *Kasky* will deprive these publishers of this information and deter its distribution, which, ironically, is designed to facil-itate support for the very type of corporate behavior that Respondent professes to support.

C. The Chilling Effect of this New Regulatory Regime Was Fully Anticipated and Already Has Begun.

The threat of liability under *Kasky* is so serious that businesses already have begun to constrict their lines of communication with the press. One business report advises companies that "[u]nless and until the U.S. Supreme Court reviews *Kasky* . . . [t]he safest course may be to make no reference at all to one's products, services, or business operations – but that may amount to saying nothing at all when one's industry is under general attack. When silence is not an option, responsive public relations statements must be made with utmost care and diligence." Jonathan A. Loeb & Jeffrey A. Sklar, *Be Careful When Your Company Speaks*, AGS&K Business Report, *at* www.alschuler.com/print/brsum02.html. Another business journal urges corporate executives to devise "preventative systems" for vetting corporate communications and campaigns, "even those that are 'defensive' in nature," and to "proceed more cautiously to

avoid negligent misstatements of fact that might otherwise occur in the rush to respond to a public relations crisis." Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 16 No. 21 Andrews Del. Corp. Litig. Rep. 11 (2002); *accord* Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak Their Minds*, Fortune, Sept. 2, 2002, at 102 (describing need for businesses to alter behavior as a result of *Kasky*).

These actions should come as no surprise to the California Supreme Court or to Respondent's supporters. The majority below acknowledged "that application of [its ruling] may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements." Pet. App. 22a. Making speakers more "cautious" is simply a euphemism for chilling speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). That is exactly what environmental and labor groups supporting Respondent are hoping for. One "corporate watchdog group" has explained that "[i]f this case is successful, it could undermine the greenwashing strategies of a lot of corporations that attempt to promote a positive environmental or social image to undermine their critics and minimize the damage done to their brand." Josh Richman, *Greenwashing on Trial*, MotherJones.com, Feb. 23, 2001, *at* www.motherjones.com/web_exclusives/features/news/greenwash.html (quoting Joshua Karliner, Executive Director of Corpwatch). After the California Supreme Court's decision was announced, an editorial that was widely circulated on anti-globalization websites declared that "[t]he ruling was a victory for the public interest and groups taking on powerful corporations and their image-makers." Jeff Milchen, *Bill of Rights Freedoms Belong to People, Not Corporations*, Pac. News Serv., May 14, 2002, *at* www.news.pacificnews.org/news/view_article.html?article_id=300. The *Kasky* decision, in other words, benefits anti-globalization groups' public relations campaigns, not consumers.

This Court has confronted a situation like this before. The litigation that culminated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), also "was a weapon in a political struggle." Anthony Lewis, New York Times v. Sullivan *Reconsidered*, 83 Colum. L. Rev. 603, 605 (1983). That case, which, like part of this one, was based on an "editorial advertisement" purchased in a newspaper, was "part of a concerted strategy" designed to chill press coverage of the desegregationists' side of the civil rights movement. Fred D. Gray, *The* Sullivan *Case: A Direct Product of the Civil Rights Movement*, 42 Case W. Res. L. Rev. 1223, 1226 (1992). And like this case, the decision under review in *Sullivan* came from a state supreme court in a region on the leading edge of one side of the public debate. It used one state's law effectively to regulate media coverage throughout the nation. *See* Lewis, *supra*, at 605.

One generation ago, this Court held in *Sullivan* that imposing strict liability in "one of the major public issues of our time" for speech containing falsehoods would undercut the First Amendment's basic purpose of assuring "uninhibited, robust, and wide-open" debate on such issues. 376 U.S. at 270-71. It is imperative that this Court grant certiorari now to ensure that the decision of the California Supreme Court is not allowed single handedly to dry up information on one side of another major public debate, this time over corporate globalization.

II. EXPANSION OF THE COMMERCIAL SPEECH DOCTRINE BEYOND STATEMENTS THAT DO "NO MORE THAN PROPOSE A COMMERCIAL TRANSACTION" IS UNNECESSARY BECAUSE MEDIA COVERAGE ADEQUATELY INFORMS CONSUMERS REGARDING COMPANIES' CONTROVERSIAL BUSINESS PRACTICES.

The California Supreme Court's expansion of the commercial speech doctrine not only threatens to hamper

media coverage of public issues regarding corporate America, but it also does so for no good reason. One of this Court's principal justifications for curtailing the level of protection afforded to commercial speech is that such speech typically affords consumers little time or ability to scrutinize its truthfulness. While that logic may sometimes make sense in the realm of product labels and advertisements, it lacks any force whatsoever when the corporate speech at issue is directed toward the media in the context of an extended public debate. Indeed, the very press coverage of Nike that forms the backdrop of this case demonstrates that the media serve as an effective watchdog over corporate press releases and more than adequately scrutinize companies' assertions regarding controversial business operations.

A. Corporate Communication with the Media, Unlike Other Corporate Speech, Permits Public Scrutiny and Counterspeech.

This Court has explained that "[i]n assessing the potential for overreaching and undue influence" of speech, "the mode of communication makes all the difference." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988). Hence, one of the main reasons that this Court affords commercial speech less First Amendment protection than other speech is that the public often "lacks sophistication" or access to the information necessary to evaluate a manufacturer's claim. *In re R.M.J.*, 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977)). When a company asserts that its product contains a certain ingredient, for example, that claim may not provide any realistic opportunity for factual or political debate. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). Consumers, therefore, "may respond to [false advertisements] before there is time for more speech and considered reflection to minimize the risks of being misled." *Id.* Even within the realm of commercial

speech, this Court has held that statements that are "more conducive to reflection and the exercise of choice on the part of the consumer" receive incrementally more First Amendment protection. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 642 (1985) (print advertisements more protected than personal solicitations); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 457-58 (1978) (same).

A corollary of this Court's inability-to-reflect rationale is that false or misleading speech in the "commercial" context may be regulated because it "lacks the value that sometimes inheres in false or misleading political speech." *Rubin,* 514 U.S. at 496 (Stevens, J., concurring). The usual rule is that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Sullivan,* 376 U.S. 279 n.19 (quoting John Stuart Mill, On Liberty 15 (Blackwell ed. 1947)); *see also Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied" to false political speech "is more speech, not enforced silence"). But in the sphere of product advertising, the predominant goal is sales, not knowledge, and the time frame is short, not long. Thus, this Court has held that the regulation of misleading commercial speech prevents "uninformed acquiescence," *Edenfield v. Fane,* 507 U.S. 761, 774-75 (1993), because "the consumer is not expected to have the competence or access to information needed to question the advertiser's claim." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 156 (1996).

The California Supreme Court's extension of the commercial speech doctrine in this case rips the doctrine completely away from this underpinning. The decision holds that a business's speech is "commercial" even if it pertains merely to a company's social "image," Pet. App. 19a-20a,

rather than to any actual product, and even if it pertains to an extended media debate, rather than an ephemeral purchasing decision. This extension is wholly unjustified.

This Court has long recognized that the press is "a mighty catalyst in . . . informing the citizenry of public events and occurrences." *Estes v. Texas,* 381 U.S. 532, 539 (1965). This is because the media do more than simply provide an empty vessel for third parties to disseminate their speech. *See Branzburg v. Hayes,* 408 U.S. 665, 729 (Stewart, J., dissenting). Rather, it is a core function of the press to scrutinize statements that it receives, as well as to investigate their statements' veracity and to set them beside the counterspeech of other interested parties. Thus, when a news organization receives a company's press release regarding its business operations, the organization can bring independent judgment to bear on the accuracy of the release. If the company's assertions are not credible, the media can decline to run any story on the subject, and sometimes does. But when responsible media entities do publish controversial claims by businesses, they make sure to contrast those claims with independent analysis or opponents' counterclaims. *Cf. Gertz,* 418 U.S. at 344 (press provides means of "counteract[ing] false statements" regarding public figures). Unlike the typical advertising scenario, in short, potentially misleading corporate press releases in the course of a public debate are tempered by their clash with competing speech.

Even when the media reprint a business's speech in an op-ed or an editorial advertisement, that speech is very likely to be responsive to, or challenged by, other articles in the same publication. In contrast to advertisements that directly propose commercial transactions, companies usually do not take the trouble to purchase space to discuss their *business operations* unless those operations are the subject of considerable public debate. Certainly that was the case with Nike. Consequently, as with press releases, the media arm

the public with the resources for full reflection on business practices discussed in op-eds and editorial advertisements.

Not only is the press effective in evaluating corporate speech and in unmasking misleading claims regarding issues of public concern; it is the preferred means of doing so. "[S]elf-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *Bellotti,* 435 U.S. at 777 n.12 (quoting *Associated Press,* 326 U.S. at 20). Accordingly, "[t]he very purpose of the First Amendment is to foreclose [the government] from assuming guardianship of the public mind" through unnecessarily regulating the content of public debate. *Riley v. National Federation of the Blind,* 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J. concurring)). Whenever the press presents the public with adequate information to assess the accuracy of a speaker's claim, "*the people* in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of the conflicting arguments." *Bellotti,* 435 U.S. at 791 (emphasis added). False statements in this context often highlight the truth.

These same default rules apply to corporate speech on public issues. Companies that comment on such issues outside of direct advertisements enjoy the First Amendment's "full panoply of protections," regardless of their motivations for doing so. *Bolger v. Youngs Drug Prods. Corp.,* 463 U.S. 60, 68 (1983); *see also Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980) (power company has unrestricted First Amendment right to comment on debate over nuclear power). Indeed, in holding in *Bellotti* that corporations have an unfettered right to speak out on proposed legislation that would affect their finances, this Court made it plain that even when such speech is merely reprinted in an editorial advertisement, the public "may consider . . . the credibility of the advocate. But if there be

any danger that the people cannot evaluate the information and arguments advanced by [a business], it is a danger contemplated by the Framers of the First Amendment." *Id.* at 791-92. They believed that a commercial motivation – such as a "creditor[]" or "manufacturing" interest – was perfectly legitimate, and that liberty and sound social policy would best be achieved by allowing a free press and an inquisitive public to weigh the unrestrained expression of *all* interested parties. Federalist No. 10 (Madison), at 58-60 (J. Cooke ed. 1961); *see also* Gordon S. Wood, The Radicalism of the American Revolution 336-37 (1992) (Framers encouraged open pursuit of all interests, including commercial interests).

The *Kasky* decision pretermits this entire process of ventilation and reflection. It holds that the moment a company sends a press release or letter to the media that offers a potentially misleading portrayal of the company's business operations, the company may be sued and held liable. It does not matter whether the media ever print the company's statements or, if they do, whether they place those statements in context or beside assertions refuting them. This holding impermissibly substitutes state regulation of the content of public debate for media scrutiny and counterspeech.

What is more, the ruling handicaps the business side of all public debates regarding business issues, by "licens[ing] one side of a debate to fight freestyle, while requiring the other side to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul,* 505 U.S. 377, 392 (1992). Especially in these circumstances, "the First Amendment is plainly offended." *Bellotti,* 435 U.S. at 785-86. Businesses and their representatives have just as much a right to speak out on any public issue as do interest groups and politicians, whose motivations for speaking are often just as selfish and whose reputations for unadorned veracity are often just as suspect. And the media are just as capable of evaluating and investigating speech from corporate sources as from anyone else.

B. The Media Coverage of Nike at the Center of this Case Confirms that Subjecting Its Speech to Consumer Protection Laws Is Unnecessary and Inappropriate.

The record and the press coverage related to this case underscore the imprudence of the California Supreme Court's decision. Although the purported linchpin of Respondent's complaint is that Nike has deceived the public by making misleading statements to the press regarding its business operations, Respondent himself acknowledges that "[t]he media have continued to expose Nike's actual practices." First Amended Complaint (Petitioners' Lodging) ¶ 19; *see also id.* Exs. F-L (collecting such articles). Indeed, a review of contemporaneous press coverage of Nike reveals that every single one of Nike's allegedly misleading statements either was never reported or was challenged by counterspeech in the same media outlet. This is what one would expect regarding an issue of intense public concern, and it leaves one at a loss as for why state regulation is necessary or appropriate in this area.

Respondent complains about three statements that Nike made in press releases. The first one, that the average line-workers' wage in Asian facilities is "double the government-mandated minimum," Compl. ¶ 46, did not generate any immediate press reports. When it did, media generally asserted in the same articles that Nike's claim was potentially misleading. *See* Elisabeth Malkin, *Pangs of Conscience: Sweatshops Haunt U.S. Consumers,* Business Week, July 29, 1996, at 46 ("Nike Chief Executive Philip H. Knight defends the Indonesian operations, saying that sneaker assemblers in Indonesia earn an average of double the minimum wage. But that's because they have no choice but to do overtime."); Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. Chron., June 27, 1996, at A19 (noting that developing countries "deliberately set [minimum wages] below the

subsistence level" and that a human rights group asserted that Nike pressured developing countries into denying overtime and keeping worker pay artificially low).

Coverage of Nike's two other allegedly misleading press releases followed a similar pattern of point and counterpoint. Respondent complains about Nike's statement that it provided "free meals" to its employees. Compl. ¶ 52. But when a typical press account repeated Nike's assertion, it also noted that other groups, "on the other hand, are concerned about persistent reports of exploitative conditions." Andy Zipser, *Nike: Shareholders Will Be Sweating It Out, Too,* Barron's, Sept. 16, 1996, at 10. Nike's third contested statement – that it guarantees "a living wage for all workers," Compl. ¶ 62 – responded to newspaper articles suggesting that Nike mistreated its workers. *See* Steven Greenhouse, *Nike Supports Women In Its Ads, But Not Its Factories, Groups Say,* N.Y. Times, Oct. 26, 1997, at A30; Dottie Enrico, *Women's Groups Pressure Nike on Labor Practices,* USA Today, Oct. 27, 1997, at B2. When another media entity printed a story based on Nike's responsive press release, it also included an assertion from an interest group that "Nike's workers in Vietnam could 'barely afford three meals a day let alone transportation, rent, clothing, health care, and much more.' " *Nike's Treatment of Women Overseas Assailed; Spokesman Defends Pay,* Dallas Morning News, Nov. 2, 1997, at A44.

Nike's letters to the editor and editorial advertisements that Respondent complains of also met with vigorous concurrent counterspeech. Nike's letter to the *San Francisco Chronicle, see* Compl. ¶ 27, appeared in the same day's newspaper as an article claiming that "Nike's hypocrisy knows no bounds." Tim Keown, *Hypocrisy is Nike's Sole Purpose,* S.F. Chron., Dec. 14, 1997, at E1. Nike's letter to the editor of *The New York Times,* Compl. ¶ 52, appeared amidst several scathing editorials concerning Nike's business

practices. *See, e.g.,* Bob Herbert, *Nike's Pyramid Scheme,* N.Y. Times, June 10, 1996, at A17; Bob Herbert, *Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, at A29; Bob Herbert, *From Sweatshops to Aerobics,* N.Y. Times, June 24, 1996, at A15; Bob Herbert, *Trampled Dreams,* July 12, 1996, at A27. Nike's editorial advertisement asserting that it was "doing a good job" and "operating morally," Compl. ¶ 56, appeared during this same time period and on the same day (June 24, 1997) as one of Mr. Herbert's columns.

In light of all of this contemporaneous press coverage, it is difficult to understand how consumers could have been deceived by any inaccuracies in Nike's speech. At the very least, any person who wished to factor Nike's labor practices into her purchasing decisions would have been alerted that serious allegations had been leveled against Nike and that Nike's credibility was being questioned. If consumers believed Nike's statements, it was not because they lacked the ability to reflect on the ongoing controversy or because they lacked access to "more speech" challenging Nike's assertions. *See Rubin,* 514 U.S. at 496 (Stevens, J., concurring); *Ohralik,* 436 U.S. at 457-58. Nor was it because any party's false statements did not "make a valuable contribution to the debate" by triggering additional investigation and corrective speech. *Sullivan,* 376 U.S. 279 n.19. In the classic mode of public discourse on a controversial issue, the media ventilated competing claims and provided the people with information that allowed them to ascertain their own conclusions.

The California Supreme Court's decision that such press coverage is somehow inadequate tramples basic First Amendment principles and demands review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

ABC, Inc., through its subsidiaries, owns ABC News, the ABC Radio Network, and local broadcast television stations that gather and report news to the public. ABC Produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20*, and *Nightline*.

American Booksellers Foundation for Free Expression is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books. It disseminates information about dangers to free expression on its website, www.abffe.com. ABFFE also publishes a monthly newsletter, which it distributes to subscribers, and makes other publications available to the public through its on-line store. ABFFE has hundreds of bookseller members who are located from coast to coast.

American Business Media, founded in 1906, is the business-to-business industry association for global information providers that represent magazines, websites, trade shows, conferences, newsletters, and other media. These member companies reach an audience of more than 88.9 million professionals and generate more than $239 billion in industry revenues.

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

Belo Corp. is a media company with a diversified, market-leading group of television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.9% of U.S. television households, and publishes four daily newspapers with a combined daily circulation of approximately 900,000 and a combined Sunday circulation of almost 1.3 million in the United States. In addition, Belo owns or operates six cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes thirty-four internet websites, several interactive alliances and a broad range of internet-based products.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of 1600 reporters in eighty-seven bureaus around the world, including two in California. Bloomberg News publishes more than 4000 news stories each day, electronically delivering business, financial and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional System, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing business news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles a year; Bloomberg Magazines, which publishes twelve different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes* and *48 Hours*. CBS owns and

operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Cable News Network L.P., LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to 15 cable and satellite television networks; 12 Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than 1 billion people in more than 212 countries and territories.

The California First Amendment Coalition, established in 1988, is a California nonprofit public benefit corporation and a 501(c)(3) charitable organization whose purpose is to "promote and defend the people's right to know." Its board of directors includes representatives of the California Newspaper Publishers Association, California Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, and Associated Press News Executives Council, as well as public members with experience in government agencies, citizen interest groups and higher education.

California Newspaper Publishers Association is a trade association representing about 500 daily and weekly newspapers. The CNPA, for well over a century, has stood in defense of the rights guaranteed by the First Amendment.

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news and operates an international news service.

Ethical Corporation publishes a monthly magazine by the same name in London, England that is distributed in Europe and throughout the world. The magazine is dedicated to delivering independent analysis, comment, news, and case studies from around the world in the area of corporate citizenship and social responsibility. *Ethical Corporation* magazine is read by over 40,000 business professionals and senior executives in large companies who are responsible for social and environmental issues.

Forbes, Inc. is the publisher of *Forbes*, the nation's leading business magazine and its international edition, *Forbes Global*, which together reach a worldwide audience of nearly five million readers. The company also publishes *Forbes FYI*, the irreverent lifestyle supplement. Other company divisions include: Forbes.com, the company's Internet business; Forbes Management Conference Group; Forbes Custom Communications partners; and American Heritage, publisher of *American Heritage* magazine and two quarterlies, *American Legacy* and *American Heritage of Invention & Technology*.

Fox Entertainment Group, Inc., through its subsidiaries, owns and operates the Fox News Channel, the Fox Broadcasting Company television network, and thirty-five local broadcast television stations that gather, produce and report news to the public.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1,400,000 daily and 1,900,000 Sunday.

National Association of Broadcasters ("NAB"), organized in 1922, is a nonprofit incorporated trade organization that serves and represents radio and television stations and networks. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities and the activities of government.

National Broadcasting Company, Inc. is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the internet and other distribution channels.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

PR Newswire Association LLC, whose website is www.prnewswire.com, provides electronic distribution, targeting and measurement services on behalf of some 40,000 customers worldwide who seek to reach the news media, the investment community and the general public with their up-to-the-minute, full-text news developments. Established in 1954, PR Newswire has offices in fourteen countries and routinely sends its customers' news to outlets in 135 countries in twenty-seven languages. Utilizing the latest in communications technology, PR Newswire content is considered a mainstay among news reporters and investors as well as increasing numbers of private individuals.

Reed Elsevier Inc. is a prominent publisher of information products and services for the business, professional and academic communities, including scientific journals,

legal, educational, medical and business information, refrence books and textbooks, and business magazines.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The Seattle Times Company publishes four newspapers in the State of Washington: *The Seattle Times*, Washington's most widely circulated daily newspaper; the *Yakima Herald-Republic*; the *Walla Walla Union Bulletin*; and *The Issaquah Press*. It also publishes four newspapers in Maine: the *Portland Press Herald/Maine Sunday Telegram*, Maine's largest daily newspaper; the *Kennebec Journal*; the central Maine *Morning Sentinel*; and the *Coastal Journal*.

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media.

Society of Professional Journalists works to improve and protect journalism. The organization is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

SRiMedia PLC, based in London, England, collects, analyzes and publishes corporate governance news, a substantial portion of which is related to topics of "corporate social responsibility" (CSR). It operates a website, www.srimedia.com, that reaches about 100,000 users who are located principally in Europe and the United States, but who also are in Asia, Australia, and Africa. SRiMedia also distributes targeted email bulletins. SRiMedia's CSR reportage addresses often-controversial issues such as human rights practices, labor relations, and environmental sustainability, and it is designed to provide information to investment organizations and individual investors who wish, as many Europeans do, to invest in socially responsible companies. SRiMedia's publications also are read by corporations interested in adopting or improving their CSR policies.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.*

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers including the *Los Angeles Times, Chicago Tribune, Baltimore Sun, Newsday, Orlando Sentinel,* and *Hartford Courant*; owns and operates twenty-four major market television stations including KCPQ and KTWB (Seattle), KXTL (Sacramento), KTLA (Los Angeles), and KSWB (San Diego), and two radio stations; and operates a network of local and national news and information websites throughout the United States.

The Washington Post Company publishes the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

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(11)

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20 pp

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Center for Individual Freedom respectfully moves for leave to file the following *amicus curiae* brief in support of the petition for certiorari. Petitioners have consented to the filing of this brief. Respondent has refused consent.

The interest of the Center in this case arises from its central organizational mission to promote individual freedoms and its especially strong concern with the freedoms protected by the First Amendment. The Center has a long-term interest in the selection and resolution of important First Amendment cases by this Court and regularly files briefs in such cases. *See, e.g.*, Brief of *Amicus Curiae* Center for Individual Freedom in Support of Petitioners, *Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, No. 00-1737 (Nov. 29, 2001); Brief of *Amici Curiae* Center for Individual Freedom, *et al.*, in Support of Petitioners, *Zelman* v. *Simmons-Harris*, No. 001751 (Nov. 9, 2001); Brief of *Amicus Curiae* Center for Individual Freedom in Support of Respondent, *United States* v. *United Foods*, No. 00-276 (Mar. 8, 2001).

This brief will discuss the national burden on free speech imposed by the decision below, the ongoing and irreparable nature of that burden, and hence the need for prompt review of the questions presented by the petition.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of California

INTEREST OF AMICUS CURIAE[1]

The Center for Individual Freedom is a nonprofit organization with the mission to investigate, explore, and communicate in all areas of individual freedom and individual rights, including, but not limited to, free speech rights, property rights, privacy rights, the right to bear arms, freedom of association, and religious freedoms. Of particular importance to the Center are constitutional protections for the freedom of speech, including the right of business persons and corporations to engage in robust public discussion and debate regardless whether their speech is categorized as commercial.

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. The liability regime sanctioned below burdens a vast range of speech deemed commercial by the California Supreme Court and makes that burden especially noxious by eliminating traditional procedural, substantive, and territorial limits that would otherwise constrain the impact of the speech restrictions. The absence of such safeguards not only directly burdens speech subject to the regime, it also generates tremendous uncertainty even for speakers not properly covered by the regime and escalates the penalty for a speaker's incorrect assessment of non-coverage or non-liability. The resulting direct suppression and indirect chill of important public debate constitute irreparable injuries to First Amendment freedoms for so long as the decision below remains intact. As with the justifications for prompt action within a single case involving preliminary injunctions or interlocutory appeals on immunity defenses, the irreparable injury that will be caused by the decision below calls for prompt Supreme Court review of even the earliest case in the certiorari process. This Court thus should grant the pending petition rather than wait for any speculative and unlikely benefit from further percolation.

2. The overbroad definition of commercial speech in the decision below also multiplies the impact of the California liability regime and introduces tremendous uncertainty for business persons and entities regarding what speech is subject to regulation. Just as uncertainty regarding the law within its field of operation can chill protected speech not constitutionally subject to penalty, so too can uncertainty regarding the scope of the law chill protected speech beyond the law's intended or permissible target. Such uncertainty and suppression of speech arises from the mere existence of the decision below and the threat of claims regardless of their merits. The First Amendment confers immunity from such burdens and that immunity will be irreparably lost for numerous speakers unless this Court grants the current petition.

ARGUMENT

The California Supreme Court held that speech "directed by a commercial speaker to a commercial audience, and [that] made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products" constitutes "commercial speech for purposes of applying state laws barring false and misleading commercial messages." Pet. App. 1a. Based on its further view that "governments may entirely prohibit commercial speech that is false or misleading," *id.*, the court upheld a California liability regime that lacks even a modicum of the procedural and substantive safeguards that have traditionally limited the First Amendment burdens imposed by various state causes of action.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CAUSES EXTRAORDINARY AND IRREPARABLE INJURY TO FIRST AMENDMENT RIGHTS NATIONWIDE.

This Court should grant the petition in this case because leaving the decision below intact will cause continuing irreparable injuries not just to petitioners, but to all business persons and corporations who do any business in California and to the public discourse throughout the nation.

While it is always the case that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976), the speech-regulating regime approved below will create uniquely burdensome and nationwide injuries to First Amendment freedoms. Applicable to great swaths of expression erroneously categorized as commercial speech, California's liability scheme also eliminates fundamental procedural, substantive, and territorial protections that have heretofore limited the burdens on speech imposed by more traditional causes of action.

The irreparable injuries generated by the decision below militate against waiting upon the wholly speculative possibil-

ity of any useful percolation of the issues in other courts. There likely will be no such percolation given that no sane plaintiff would sue under the California law anywhere else but in California state courts, and no other states have adopted such aggressive regimes as California's for regulating speech. Furthermore, the injuries caused by the decision below will be continuous during any such delay and will not be mitigated by any more speech-protective rulings in other jurisdictions.

In somewhat analogous circumstances, this Court has recognized that certain potential burdens on protected rights are too severe to delay review of various immunity determinations until after final judgment. *See, e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (where immunity is predicated on "an entitlement not to stand trial or face the other burdens of litigation, * * * it is effectively lost if a case is erroneously permitted to go to trial" and an order denying immunity warrants an immediate appeal). The same principles justifying early interlocutory appeals of orders for denial of qualified immunity likewise favor this Court's review of cases denying constitutional immunities that will have a disproportionate or irreparable impact on the rights of potential future defendants.

In this case, the First Amendment rights at issue will be burdened not only by any continuing litigation in this case itself, they will be burdened for all potential speakers subject to suit under California law. And that burden will persist regardless of whether petitioners or defendants in other cases are eventually vindicated on the merits. Review of the questions presented here should be had at the earliest opportunity because delaying review will allow far too much damage to First Amendment freedoms during the intervening period.

A. Elimination of Procedural Safeguards

Acting on the premise that "governments may entirely prohibit commercial speech that is false or misleading," Pet. App. 1a, the court below sanctioned a speech-liability scheme devoid of many procedural protections that serve to guard

against burdensome yet easily made charges that speech is false or misleading. The absence of such protections means that even protected commercial and non-commercial speech will be plagued with difficult-to-dismiss claims, potentially crippling remedies, and years of litigation. The mere threat of such litigation will undoubtedly chill many speakers and will critically handicap public debate.

To prevent such a crippling chill, First Amendment jurisprudence incorporates various due process protections in order to confine, predictably and consistently, any permissible speech restrictions to their proper and limited domains. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (discussing intersection of due process and First Amendment); *see also Waters* v. *Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion) ("we have often held some procedures * * * to be constitutionally required in proceedings that may penalize protected speech"); *id.* at 686-87 (Scalia, J., concurring in the judgment) (agreeing that the "First Amendment contains within it some procedural prescriptions" at least for deprivations through the judicial process). Because it often can be hard to discern, *ex ante*, the substantive line between protected and unprotected speech, the First Amendment relies on various procedural devices to create the necessary "breathing space" for protected speech. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

Procedurally protected breathing space is especially important where the basis for imposing liability is the alleged falsity of the speech at issue. Our Constitution, jurisprudence, and tradition have little faith in government processes to dictate the "truth": "[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945). We generally have been content to protect against the hazards of false speech with the tonic of competing speech, entrusting the public, rather than the government, to decide which of the opposing positions is true and

which is false. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

In this case, numerous traditional restraints on private claims that would otherwise mitigate the danger to speech have been discarded in favor of a single-minded effort to deter and suppress supposedly false or misleading speech. For example, the California speech regime effectively eliminates standing as a requirement to bring suit, allowing "any person" to sue on purported behalf of the "general public." Pet. App. 84a (CAL. BUS. & PROF. CODE § 17204). It abolishes any need to include "[a]llegations of actual deception, reasonable reliance, and damage," or to plead fraud with specificity. *Committee on Children's Television, Inc.* v. *General Foods Corp.*, 673 P.2d 660, 668, 669 n. 11 (Cal. 1983). And, consistent with a regime unrelated to actual consumer injury, a California court may impose massive financial penalties – misleadingly dubbed "restitution" – "without individualized proof of deception, reliance, and injury." *Id.* at 668; *see also Fletcher* v. *Security Pacific Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979.) ("section 17535 authorizes restitution not only of any money which *has been acquired* by means of an illegal practice, but further, permits an order of restitution of any money which a trial court finds '*may have been acquired* by means of any * * * [illegal] practice.'") (emphasis altered).[2]

The absence of so many traditional procedural safeguards is compounded by California's extension of liability to *truthful* speech subsequently deemed to be misleading and by the absence of any meaningful scienter requirement. Such a trivial threshold for initiating and sustaining a suit multiplies the danger of suppressing protected speech and makes it exceptionally difficult to obtain pre-trial dismissal or summary

[2] In addition to such penalties, claimants may seek injunctions against speech, compelled speech, and attorney's fees. Pet. App. 4a.

judgment. It also increases the prospect of unanticipated liability for speech. Making liability depend on interpretations of the intent and effect of speech

> puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Thomas v. *Collins*, 323 U.S. at 535.

The net effects of having abandoned so many traditional limits on speech-suppressing suits are that vast quantities of entirely truthful speech will be penalized and deterred. It will be easy to claim that speech is false or misleading in the context of contentious public issues that often will have no black and white answers. Disagreements and conflicting interpretations are rife in such public debates, and much of the partisan advantage from a charge of falsehood – burdening one's adversary, chilling further speech – can be gained from the charge itself, regardless of the eventual outcome of the case.

Those consequences alone infringe upon First Amendment freedoms and require at least some heightened scrutiny. "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer * * * wider of the unlawful zone,' * * * and thus 'create the danger that the legitimate utterance will be penalized.'" *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) (citations omitted); *see also FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities"); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 n. 21 (1978) ("burden and expense of litigating" uncertain requirements

would "unduly impinge on the exercise of the constitutional right" to free speech). Such First Amendment burdens exist independent of whether the legal regime is targeted at speech that, as a substantive matter, may be regulated or prohibited without offending the First Amendment. *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965), (absent procedural safeguards for film censorship scheme that provided for prohibition of, *inter alia*, obscene films, "it may prove too burdensome to seek review of the censor's determination").

The elimination of so many procedural safeguards thus vastly expands the suppression not only of speech targeted by the liability regime, but also of speech that is not covered – and that could not be covered – by California's restrictions. Such sweeping and irreparable injury to combined due process and First Amendment interests warrants this Court's prompt attention.

B. Speaker Discrimination

In addition to due process safeguards, the First Amendment incorporates Equal Protection principles in order to provide a check against distortion of the marketplace of ideas and to guard against abuse of minority or disfavored groups and views. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980).

California's speech-regulating regime involves just such discrimination "among speakers conveying virtually identical messages" and thus is "in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 194 (1999); *see also Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 535 (1980) (limiting "the means by which [a corporation] may participate in the public debate on

* * * controversial issues of national interest and importance," "strikes at the heart of the freedom to speak."). There is no material difference, in terms of the interests behind California's unfair competition law, between the speech by petitioners at issue in this case and the speech to which petitioners were responding. The anti-Nike criticisms were plainly targeted to consumers among others and were designed to influence their purchasing decisions. They were no more difficult to verify, were more likely to create actual injury (to Nike), and were more likely to be relied upon by consumers, who are often skeptical of denials of corporate wrongdoing. Yet speech by businesspersons and entities is subject to liability in California while identical or more problematic speech by others is protected.[3] But the "inherent worth of the speech in terms of its capacity for informing the public," this Court explained, "does not depend upon the identity of its source, whether corporate, association, union, or individual." *Bellotti*, 435 U.S. at 777.

Aside from rendering the one-sided restrictions unconstitutional, such discrimination also highlights the immediate and continuing danger of declining to grant review in this case. Many current issues now vigorously being debated involve conflicts between the business community and certain segments of the public. Criticisms of accounting practices, stock broker behavior, and globalization generally force businesses into defending themselves against attacks from business critics. (Even debates involving abortion sometimes involve providers of abortion services – business entities within the scope of California's liability regime – defending them-

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[3] The discrimination between speakers also undermines the alleged state interest supporting the law – that of fair competition and accurate information to consumers. *See Greater New Orleans Broadcasting*, 527 U.S. at 186-87 (questioning whether federal interests in discouraging gambling were even "substantial" where federal policy was "decidedly equivocal" and where Congress was unwilling "to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General").

selves against criticism from abortion opponents.) Allowing the California regime to remain in place while the issue percolates thus will impose a predictably anti-business bias to many pressing debates with the dangerous potential to distort public opinion and policy in an area already prone to political hay-making and a revived regulatory impulse.

C. Extraterritorial Application

As with the intersection between the First Amendment and the Due Process and Equal Protection Clauses, there is likewise added concern where the First Amendment interfaces with the Commerce Clause through the imposition of extraterritorial restrictions on speech. Such concern not only requires heightened scrutiny of the extraterritorial speech restrictions in this case, it also increases the urgency of review by this Court.

A core tenet of Commerce Clause jurisprudence is that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid." *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989); s*ee also Edgar* v. *MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality opinion) (state statute invalid because it "directly regulates transactions which take place across state lines, even if wholly outside the State").

Just as "extraterritorial regulation of interstate commerce" squarely conflicts with the Commerce Clause, *Healy*, 491 U.S. at 332, extraterritorial regulation of commercial speech conflicts with both the Commerce Clause and the First Amendment and thus imposes an especially aggressive constitutional affront. *Cf. Bigelow* v. *Virginia*, 421 U.S. 809, 828-29 (1975) (state restrictions affecting "a wide variety of national publications or interstate newspapers * * * would impair, perhaps severely, the[] proper functioning" of the press and the free exchange of ideas generally).

In this case, the effect of California's regime is to effectively regulate "commerce that takes place wholly outside of

the State's borders," *Healy*, 491 U.S. at 336, by establishing singularly rigorous minimum standards for business speech that will, by necessity, apply throughout the country. Those standards apply to speech occurring wholly outside California and between businesses and citizens of other states because of the near certainty that any such speech will eventually find its way into California through any number of nationwide and global media. Any business wishing to communicate to the public anywhere in the country will thus have to do so on California's terms.

The Commerce Clause makes such regulation invalid "whether or not the commerce has effects within the State" and bars a State from adopting "legislation that has the practical effect of establishing" rules of conduct "'for use in other states.'" *Id.* (citation omitted). That such regulation would be invalid even as to purely economic activity necessarily establishes the invalidation of extraterritorial regulation operating in the constitutionally protected realm of speech.[4]

While legal error confined to a single jurisdiction may be tolerable while this Court awaits further development of the law in other courts, a decision with nationwide impact drastically alters the balance between this Court's institutional interests and the public and private burdens imposed by that decision. The balance in this case warrants prompt review of the California Supreme Court's broadly encroaching decision rather than the deferral of consideration until some later date.

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[4] That the speech targeted by the California regulatory regime is supposedly unprotected when false and misleading does not drop this case back to a standard Commerce Clause analysis because the regime still impacts, directly and indirectly, substantial amounts of speech that would be found entirely lawful in a suit on the merits. Furthermore, much of the supposedly misleading speech regulated by California law would be unregulated – and hence constitutionally protected – under the laws of other states. As petitioners pointed out, California's liability regime is unique throughout the country for its depth and breadth of regulation. Pet. 29.

II. THE PETITION PRESENTS IMPORTANT QUESTIONS REGARDING THE SUBSTANTIVE REACH OF THE COMMERCIAL SPEECH DOCTRINE.

The danger to protected expression, and hence the need for this Court's prompt review, is further demonstrated by the overbroad and uncertainly applied definition of commercial speech adopted by the court below. That definition sweeps in far more expression than is allowed by the First Amendment and is so uncertain in its boundaries that it generates an extensive penumbra of threat to protected speech. Such breadth of direct regulation and chilling effect elevates the national importance of the questions presented and the adverse consequences of denying review. It thus strongly favors granting the present petition.

The California Supreme Court's categorization as commercial speech virtually all "representations of fact about the speaker's own business operations for the purpose of promoting sales of its products," Pet. App. 1a, is shockingly broad and would seem to encompass speech well beyond the specifics of this case. The statute itself, for example, applies to persons discussing anything related to the sale of any "property" or "services" by virtually any means whatsoever, including "public outcry or proclamation." Pet. App. 87a (CAL. BUS. & PROF. CODE § 17500). If the sale of "services" is no less commercial than the sale of products, then it would seem that all businesses, professionals, and even sports teams can be subjected to liability for what they say about themselves. Even employees and political candidates – selling the "services" of their labor – are seemingly engaging in commercial speech by California's lights. And insofar as purchasing or investment decisions are made on the basis of the public's moral view of a company, then virtually *nothing* a company could say to the public would be immune from categorization as commercial speech.

Whatever the current application of the decision below, therefore, the line between commercial and noncommercial speech it creates is far "too elusive for the protection of" First Amendment freedoms. *Winters* v. *New York*, 333 U.S. 507, 510 (1948). The multiple factors relied upon by the court to distinguish between commercial speech and other forms of speech do not stand up to scrutiny, and hence offer no predictive security for future defendants. For example, the suggestion that a profit motive behind "advertising" justifies lesser protection, Pet. App. 12a, does not distinguish it from much other speech and hence leaves many speakers uncertain as to whether their speech is commercial. And whether speech has a purpose of promoting some eventual transaction, Pet. App. 1a, is an essentially meaningless factor in a world where consumer decisions can turn on a myriad of factors unrelated to the substance of the product or service itself, and hence virtually any speech could be alleged to relate to promoting sales.

The combined breadth and uncertainty of the definition of commercial speech adopted below poses an exceptional threat to speech both within and anywhere in the ballpark of the boundaries of California's liability regime. That threat provides an important reason to grant the petition for certiorari.

Finally, this case also could provide an opportunity to clarify the scope of the commercial speech doctrine in a manner that might alleviate much of the ongoing controversy and disagreement on the issue. Many of the disputes plaguing the commercial speech doctrine in recent years could be attributable, at least in part, to problems regarding the scope of the doctrine. If diligently confined to its core object of "speech that does no more than propose a commercial transaction." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001), the doctrine would cause less friction. So limited to speech that is "'linked inextricably' with the commercial arrangement that it proposes," *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993) (citation omitted), the commercial speech doctrine effectively becomes a special application of the *O'Brien* test

for regulations of conduct that create incidental burdens on speech. *See United States* v. *O'Brien*, 391 U.S. 367 (1968).[5]

An alternative means of confining the commercial speech doctrine to a less troubling and troublesome field of operation would be to emphasize certain clear elements that remove speech from the confines of the doctrine and return such speech to normal First Amendment treatment. For example, speech involving publicly debated issues, commercial or otherwise, plainly makes a "direct contribution to the interchange of ideas," *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 780 (1976), and thus should be clearly excluded from the doctrine. Similarly, given the ongoing public and legislative concerns over corporate morality, character, and responsibility, discussions of company character and operations, as opposed to direct and immediate attributes of a product or transaction itself, should be excluded from down-categorization as commercial speech. Discussions of the character of publicly visible companies, like discussions of public figures in general, are far more likely to involve broader public issues and thus restrictions are more likely to interfere with robust public debate.

Overall, the decision below has created and will sustain an extensive and irreparable burden on speech until this Court acts to pare it back. Postponing review adds little value to the eventual process but costs the public much in injury to public discussion of important and recurring issues. Granting certiorari now can forestall such consequences and provide this Court with an opportunity to address and resolve problems with the commercial speech doctrine in general.

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[5] And while aspects of the commercial speech doctrine remain inappropriate for addressing restrictions even on a narrowed category of commercial speech, the disagreement caused by the current doctrine can at least be substantially mitigated by confining it to a limited area.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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Dated: November 15, 2002.

(31)

Supreme Court, U.S.
FILED
FEB 28 2003

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

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v.

MARC KASKY,

Respondent.

On Writ of Certiorari
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61pp

QUESTIONS PRESENTED

1. When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Philip Knight; Thomas Clarke; Mark Parker; and David Taylor.

RULE 29.6 STATEMENT

Petitioner Nike, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

RULE 29.4(C) CERTIFICATION

Petitioner certifies that 28 U.S.C. 2403(b) may apply and that this Brief has been served upon the Attorney General of California.

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State Farm Fire & Cas. Co. v. *Superior Court*, 45 Cal. App. 4th 1093 (1996).....4
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Thomas v. *Collins*, 323 U.S. 516 (1945).....32, 42, 50

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Time, Inc. v. *Hill*, 385 U.S. 374 (1967).....43, 44
United States v. *Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943).....50
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001).....18, 22, 31
Va. State Bd. of Pharmacy v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).....passim
Valentine v. *Chrestensen*, 316 U.S. 52 (1942).....19, 25
Whitney v. *California*, 274 U.S. 357 (1927).....50
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Zschernig v. *Miller*, 389 U.S. 429 (1968).....31

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Other Authorities

Act for Regulating Taverns, &c. (1778), *reprinted in The First Laws of the State of New Hampshire* (John D. Cushing ed., 1981).....47

Bernie Sanders, *Webwire – Nike Corporate Practices Come Under Attack*, Congressional Press Release, Oct. 24, 1997.....23

Big Labor Rips Nike at Big PR's Annual Outing, O'Dwyer's PR Services Report, July 1998 28

Brad Knickerbocker, *Nike Fights Full-Court Press on Labor Issue*, Christian Science Monitor, Sept. 23, 1997.....29

Danielle Knight, *Labor-Environment: Shoe Plant Called Unsafe for Workers*, Inter Press, Nov. 10, 1997.....28

Dean K. Fueroghne, *Law & Advertising* (1995) 47

Dee Pridgen, *Consumer Protection and the Law* (2002) 46, 47

In America; Nike's Bad Neighborhood, N.Y. Times, June 14, 1996.....28

Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* (5th ed., 2001).....47

March Down Fifth Avenue in New York City Protesting the Use of Child Labor Abroad to Make Products Which American Consumers Buy Relatively Cheap (Nat'l Pub. Radio broadcast, Dec. 11, 1998).....23

Morton J. Horwitz, *The Historical Foundation of Modern Contract Law*, 87 Harv. L. Rev. 917 (1974) 47

N. Craig Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (1990).....27

Nat Hentoff, Op-ed, *The Trouble With Role Models*, Wash. Post, Oct. 25, 1997 29

Nike Contractors Accused of Worker Abuse, Assoc. Press, Mar. 29, 1997.....29

Nike Plant Conditions in Vietnam Hit in Audit, Reuters, *reprinted in* Chicago Tribune, Nov. 10, 1997 28

Paula L. Green, *Nike, Jordan Challenged on Conditions Indonesian Worker in Court Battle*, J. of Commerce, July 25, 1996.....23

Robin Bulman, Editorial, *Nike's Tainted Cash?*, J. of Commerce, July 23, 1996.....23

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BRIEF FOR THE PETITIONERS

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at Pet. App. 83a-88a.

OPINIONS BELOW AND JURISDICTION

The opinion of the Supreme Court of California (Pet. App. 1a-64a) is published at 45 P.3d 243. The opinions and orders of the Court of Appeal and Superior Court (Pet. App. 66a-79a, 80a-81a) are unpublished. This Court has jurisdiction under 28 U.S.C. 1257(a).

STATEMENT OF THE CASE

This "private attorney general" action brought by respondent Marc Kasky against petitioner Nike asserts that petitioner violated California consumer protection statutes. Although Kasky disclaims any knowledge of the underlying facts, he asserts that Nike – in newspaper articles, letters to the editor, press releases, and correspondence – made false or misleading responses to publicly reported allegations regarding labor conditions at factories run by Nike contractors in Southeast Asia. Respondent invokes statutes that impose liability without requiring that Nike spoke with reckless disregard for the truth or purposefully lied. To the contrary, liability under the state Unfair Competition Law is "strict." The statutes also do not require, and Kasky does not allege, that anyone relied on any statement by Nike, much less that anyone has been, or was likely to be, injured as a result. The California Superior Court and California Court of Appeal held Kasky's claims barred by the First Amendment, but a sharply divided California Supreme Court reversed.

I. Introduction To The Controversy Over Working Conditions At Nike Contract Factories

Petitioner Nike, the world's leading athletic footwear, apparel, and equipment manufacturer, has for several years

been the principal focus of the passionate worldwide debate over "globalization" – *viz.*, the net impact of multinational investment on the developing world, the degree to which such investment should be regulated, and the pace at which it should occur. Nike's goods are produced by third parties under contract to Nike at approximately 900 factories in 51 countries with more than 600,000 employees. Beginning in 1995, Nike was the target of allegations that, at facilities in Southeast Asia, conditions were dangerous and workers were mistreated and underpaid. The upshot of these charges was not that Nike's products were themselves inferior, overpriced, or harmful, but rather that it was an immoral company, generating great profits on the backs of Third World labor. Those assertions quickly generated enormous media scrutiny and commentary, much of it pointed and vituperative, coupled with demands for legislative action and a broad effort to bring the heavy weight of moral opprobrium down on Nike and its employees.

Nike found itself responding on an immediate basis to assertions that, through its contract partners, it was operating sweatshops in supposedly slave-labor conditions. Although some news organizations concluded that some allegations against Nike had merit, former United Nations Ambassador Andrew Young concluded in an independent review commissioned by Nike that the charges were largely false. Nike then purchased "editorial advertisements" – *i.e.*, paid political advertisements (see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964) (affording such expression the full protection of the First Amendment)) – to report the results of that review. Nike officials also responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and in letters to officers of national universities.

These various statements conveyed the view that Nike does act morally because its investments produce substantial economic and political benefits for workers and because it puts its best effort towards ensuring that employees at its

contract facilities are paid fairly and treated well. Although some of Nike's own statements noted that some consumers consider these ethical issues in making purchasing decisions, none of the statements at issue appeared in advertising of Nike's products or urged consumers to buy those products.

II. Relevant Provisions Of California Law

California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code 17200 et seq., *reproduced at* Pet. App. 83a-87a) prohibits, *inter alia*, "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code 17200 (2003). California broadly defines "advertising" to encompass essentially any statement relating to the speaker's products or services that is received in California, no matter where in the world it is published. *Id.* § 17500; Pet. App. 87a.

UCL suits may be brought by any California citizen in the role of "private attorney general." Cal. Bus. & Prof. Code 17204; Pet. App. 83a-84a. Liability is "strict" in that the defendant may be held liable even for literally true statements that a court later deems misleading; and such liability attaches notwithstanding the speaker's best efforts to ensure the statements' accuracy. *Cortez* v. *Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163 (Cal. 2000).

The California Supreme Court has long construed the UCL's capacious remedial provisions so as to "deter the defendant, and similar entities, from engaging in such practices in the future," stressing its commitment to "effectuate the full deterrent force" of the statute. *Fletcher* v. *Sec. Pac. Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979). A victorious UCL plaintiff may secure an injunction, including a command that the defendant engage in a court-supervised campaign of corrective speech. Cal. Bus. & Prof. Code 17203; Pet. App. 83a; see *Consumers Union* v. *Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972 (1992). The plaintiff may furthermore secure an "order for restitution" that may require the defendant to "return money obtained through

an unfair business practice to those persons in interest from whom the property was taken." Pet. App. 65a (quoting *Kraus* v. *Trinity Mgmt. Servs.*, 23 Cal. 4th 116, 127 (2000)).

The California Supreme Court has explicitly rejected, however, the argument that a court may require the defendant to provide restitution of "money 'which may have been acquired' through an unlawful practice" only when there is proof that individuals actually relied upon the defendant's misstatements. *Kraus*, 23 Cal. 4th at 134. Restitution may be awarded *without* "proof of deception, reliance, and injury." *Bank of the West* v. *Superior Ct.*, 2 Cal. 4th 1254, 1267 (1992). "This means that a violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." *State Farm Fire & Cas. Co.* v. *Superior Ct.*, 45 Cal. App. 4th 1093, 1105 (1996).

The UCL encompasses every violation of California's False Advertising Law ("FAL") (Cal. Bus. & Prof. Code 17500 et seq., *reproduced at* Pet. App. 87a-88a). See Pet. App 83a. Like the UCL, the FAL applies to any "untrue or misleading" statement intended to result in the sale of products or services. Cal. Bus. & Prof. Code 17500. "A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under [the UCL and FAL]." *Day* v. *AT&T Corp.*, 63 Cal. App. 4th 325, 332-33 (1998). Also like the UCL suit, an FAL suit for injunctive relief and restitution may be brought by any citizen who chooses to appear as a "private attorney general." Cal. Bus. & Prof. Code 17535; Pet. App. 7a. But unlike the UCL, the FAL applies only to misstatements made negligently and carries criminal penalties. Cal. Bus. & Prof. Code 17500.

III. Respondent Kasky's Allegations

Respondent Kasky brought this suit under the UCL and FAL. See generally First Amended Complaint of Milberg,

Weiss, *et al.* for Marc Kasky versus Nike, Inc., *et al.* (July 2, 1998) [hereinafter Compl.].

1. Kasky, a "nominal plaintiff" (Pet. App. 66a), sued "on behalf of the General Public of the State of California" (Compl. ¶ 3). He disavows any personal knowledge of the facts he alleges, other than that he is a citizen of the State of California, which is his sole qualification to be the plaintiff. *Id.* ¶¶ 3, 8. He does not assert that he ever read any of the statements that he claims are unlawful, and he expressly "alleges no harm or damages whatsoever regarding himself individually." *Id.* ¶ 8. Kasky names as defendants Nike and five of its officers. (Because the principal defendant is Nike, we hereinafter use the collective "petitioner" or "Nike.").

The gravamen of Kasky's complaint is that, in 1996 and 1997, Nike responded to public allegations against it by making misstatements about working conditions at the Southeast Asian factories that manufacture certain Nike products. The complaint asserts, under the heading "Nike's Sweatshop Stigma," that the public's perception of Nike as a moral company "has come under attack in the past few years." Compl. ¶ 18. Kasky says "[t]he media have continued to expose" what he asserts are "NIKE's actual practices," citing reports by media outlets large ("*e.g.*, CBS NEWS, *Financial Times*, *The New York Times*, [and] *The San Francisco Chronicle*") and small ("*Greensboro North Carolina News and Record*, *Buffalo News* and *The Oregonian*"), "all of whom have run stories and articles which expose NIKE's actual practices." *Id.* ¶ 19. As Kasky later put it, "[t]he criticism of Nike's labor practices came from many quarters: network-television documentaries, columnists in national and local newspapers, consumer groups, labor unions, human-rights groups and nongovernmental organizations, church groups, Internet websites, college students and faculty, and demonstrators in the streets." Resp. Cal. S. Ct. Open. Br. 3. See also Compl. ¶ 54 (noting that Nike was the subject of a protest by "hundreds of persons [who] filled San Francisco's Union

Square"). The company has made misrepresentations, Kasky says, "in response to the public exposure of [its] labor policies and practices." *Id.* ¶ 18.

Kasky does not allege that Nike made a single false or misleading statement in a label on or an advertisement of a Nike product, nor that any of the statements in question even referred to any Nike product or to its qualities, such as price, suitability for a particular use, reliability, or effects on anyone's health or safety. Further, the counts of Kasky's complaint do not allege that Nike was anything more than negligent in making the statements he claims were false or misleading. Kasky alleges that "[t]he direct and proximate cause of defendants' misrepresentations was the negligence and carelessness of NIKE." Compl. ¶ 76. He pointedly alleges not that Nike misspoke purposefully or with reckless disregard *of the truth* but rather "with knowledge or with reckless disregard *of the laws of California* prohibiting false and misleading statements." Compl. ¶ 80 (emphasis added).[1]

2 The complaint follows a consistent pattern. It repeats an accusation that has been made publicly against Nike regarding conditions at a particular contract facility, identifies a statement by Nike that is arguably contrary to (or that explicitly denies) a similar allegation regarding conditions in Southeast Asia generally, and flatly asserts that the latter is false or misleading. A principal theory of the complaint is that Nike acted unlawfully by omission. "NIKE disclosed none of these facts to California consumers either in the promotion of its shoes or at the point of purchase, or in any other manner." Compl. ¶ 18.

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[1] The counts of the complaint do not advance the assertion, made once in the complaint's factual section, that Nike's statements regarding wage and hour issues were "intentionally and/or recklessly misleading and deceptive *and/or* were negligently made because they omit" allegations made against the company. Compl. ¶ 30 (emphasis added).

Kasky makes such allegations with respect to six classes of supposedly false or misleading statements:

• Kasky contends that Nike made unlawful "[c]laims that workers who make NIKE products are protected from and not subjected to corporal punishment and/or sexual abuse." Compl. ¶ 1(a). Kasky relies principally on a three-page document released by New Jersey businessman Thuyen Nguyen on behalf of "Vietnam Labor Watch," which calls on Nike to "cooperate with the Vietnam General Confederation of Labor" to address issues regarding factory conditions. *Id.* ¶ 18; *id.* App. 128. The author states that he "spoke to 35 workers" in reaching his conclusions. He reports that female workers "were forced to run around the factory's premise in the hot sun because they weren't wearing regulation shoes" and that "[o]ther forms of punishment used are forcing workers to stand in the sun (sun-drying), kneel on the floor with hands up in the air, write down their mistakes over and over again like parochial school children, clean the toilet and sweep factory floors." *Id.* App. 128-29. Further, female employees at the Vietnam plant "have complained about frequent sexual harassment from foreign supervisors." *Id.* (Mr. Nguyen's accusations became the basis for a month-long series of Doonesbury comic strips highly critical of Nike. Tim Shorrock, *Vietnam Protects its Labor Force; Foreign Investors Face Fines for Infractions*, J. of Commerce, July 7, 1997, at 1A.)

Kasky also points to U.S. media reports. A broadcast by the CBS program "48 Hours" on a Samyang, Vietnam factory noted that a Vietnamese newspaper had reported that a supervisor had hit fifteen women with a shoe for poor sewing and reported an allegation by an unnamed person that "45 women [were] disciplined, forced to kneel down and raise their hands in the sky for 25 minutes straight." Compl. App. 133, 134. An ESPN report also stated that at another factory in Vietnam "a producer saw a female supervisor slap a female worker on the arm" and a reporter "saw a supervisor angrily throw a shoe at a worker." Compl. ¶ 29.

Based on those allegations, Kasky alleges (Compl. ¶ 28) that three statements by Nike were false or misleading: In 1993, the Athletic Footwear Association (of which Nike is a member) adopted guidelines stating that its members "will only do business with partners whose workers are * * * not put at risk of physical harm." *Id.* App. 195. Nike itself adopted a Code of Conduct providing that its contractors must have "zero tolerance of corporal punishment or abuse, or of harassment of any kind." *Id.* App. 198. (Kasky omits that Nike acknowledges that "[c]ode violations can happen" and describes its policy to remedy those violations. *Id.*) And in 1996, Nike responded to "media attention" by issuing a "primer" stating that "Nike expatriates ensure safe working conditions and prevent illegal working conditions." *Id.* App. 203, 208.

• Kasky next contends that Nike made unlawful "[c]laims that NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours." Compl. ¶ 1(b). Kasky points to an October 1997 report by the "Hong Kong Christian Industrial Committee," a group challenging "political authoritarianism and repression of the workers' movement" and "repression of independent union organising" in China. Compl. ¶ 32; *id.* App. 98. The report addresses factories "in the special economic zone of the Pearl River Delta in Guandong Province in southern China" and is based on interviews during Spring 1997 "with 10 workers in" each of five factories, some of which produced Nike products. *Id.* App. 100. According to that report, the factory has required workers to work overtime in violation of China's Labor Law and "pregnant workers are treated with disrespect and have been, on occasion, unjustly terminated." Compl. ¶ 32.

Kasky also points to an Ernst & Young report on conditions in December 1996 at one of Nike's several hundred contract facilities – the Tae Kwang Vina Industrial Ltd. Co. plant in Bien Hoa City, Vietnam – which identified "48 cases where workers were required to work above the

maximum working hours" (although Kasky omits that workers are paid a "150% overtime rate"). Compl. App. 82. Finally, Kasky relies on the aforementioned Thuyen Nguyen document, which alleges based on Nguyen's interviews with thirty-five employees that it is the "norm" to require employees to work overtime. Compl. App. 129.

On the basis of those allegations, Kasky asserts that two statements by Nike are false or misleading: In June 1996, Nike wrote to various university officials – responding to "attack[s] from the Made in the USA Foundation, and other labor organizers" – stating that the Nike Code of Conduct and Memorandum of Understanding "bind[] its production subcontractors" to "compl[y] with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity." Compl. App. 190; see also *id.* App. 181.[2] Nike also wrote to an individual in Tilburg, Germany, stating that "Nike will demand that [a] subcontractor address" violations. *Id.* App. 187.

• Kasky contends that Nike made false or misleading "[c]laims that NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions." Compl. ¶ 1(c). Kasky points to the Ernst & Young report, which stated that certain areas of one plant in Bein Hoa City, Vietnam, contained dangerous levels of toluene, acetone, and dust. *Id.* App. 88. ESPN also reported that female workers in Vietnam had been exposed to toluene. Compl. ¶ 45.

On this basis, Kasky claims that Nike made three false or misleading statements. First, it wrote to university officials that its Memorandum of Understanding requires subcontractors to comply with "applicable government regulations regarding occupational health & safety [and]

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[2] Kasky neglects to note the letter's explanation that, "given the vast area of our operations and the difficulty of policing such a network, some violations occur." Compl. App. 190-91.

environmental regulations." Compl. ¶ 39; *id.* App. 190. Second, Nike CEO Philip Knight said at a shareholders' meeting that, at new shoe factories, "you'll find air quality even in the rubber room is better than it is in Los Angeles." *Id.* App. 265. Third, a Nike official was quoted in an article in *The Oregonian* as responding to allegations of "the Transnational Resource and Action Center, a San Francisco-based activist group," by stating that the effort to require subcontractors to meet U.S. OSHA standards is "a work in progress." Compl. ¶ 44; *id.* App. 170-71.

• Kasky contends that Nike made false or misleading "[c]laims that NIKE pays average line-workers double-the-minimum wage in Southeast Asia" (Compl. ¶ 1(d)) and, relatedly, false or misleading "[c]laims that NIKE guarantees a 'living wage' for all workers who make NIKE products" (*id.* ¶ 1(g)). Kasky points to the conclusions of the Hong Kong Christian Industrial Committee regarding its interviews with ten workers at factories in Guangdong Province, China. Compl. ¶ 18; *id.* App. 98, 100. The committee states that employees work long hours without overtime pay and calls on Nike to require its contractors to pay a "living wage" that is "above the minimum wage as set" by law. *Id.* App. 115. Kasky also points to a letter by Nike stating that "our factories pay at least the locally-mandated minimum wage" and explaining that Nike "*cannot* ask our contractors to raise wages" to the level of a "living wage" as "generally defined as sufficient income to support the needs of a family of four" (*id.* App. 122-23 (emphasis added)) because so disproportionate a demand in the labor market would inevitably result in "driving us all out of business, and destroying jobs, in the process." *Id.* App. 123.

Based on those statements, including Nike's *own* statement that it cannot require subcontractors to pay a "living wage," Kasky alleges that Nike made a false or misleading statement when issuing a press release in Washington, D.C., that responded to allegations made at "a news conference by

San Francisco-based Global Exchange" and that referred to workers receiving a living wage. Compl. App. 322.

• Kasky next contends that Nike made false or misleading "[c]laims that workers who produce NIKE products receive free meals and health care." Compl. ¶ 1(e). Kasky points to Vietnam Labor Watch's translation of an article in the *Youth Newspaper* of Ho Chi Minh City, which urges readers to "request a Nike action packet" and explains that "the Dong Nai Confederation of Labor * * * will bring pressure to bear on Nike and its contractors." *Id.* App. 272-73. This article assertedly concludes that workers were required to pay for lunches. Compl. ¶ 53.

On this basis, Kasky claims that Nike made two false or misleading statements: First, Nike CEO Philip Knight wrote a letter to the editor of *The New York Times* responding to "Bob Herbert's June 10 and June 14 columns on Nike's operations in Asia." Compl. ¶ 52; *id.* App. 285. The letter states that workers in Nike contract facilities have received "free meals, housing and health care and transportation subsidies." *Id.* App. 285. Second, Nike released a document entitled "Nike Responds to Sweatshop Allegations" – which "respond[s] to claims made by Joel Joseph, chairman of the Made in the USA Foundation," an organization "largely financed by labor unions" – stating that "compensation [at subcontractor factories] extends beyond wages to include * * * free meals * * *." Compl. ¶ 52; *id.* App. 270.

• Kasky finally contends that Nike made false or misleading "[c]laims that the GoodWorks International (Andrew Young) report proves that NIKE is doing a good job and 'operating morally.'" Compl. ¶ 1(f). Kasky points to the fact that the report in question "did not address, directly or indirectly, wage, hour and overtime" issues, a point that Mr. Young himself made when the report was released. Compl. ¶¶ 58(a)-59(a); *id.* App. 289. Further, the report did not address the Ernst & Young report on the Tae Kwang Vina Industrial Ltd. Co. plant in Bien Hoa City, Vietnam. *Id.* ¶

58(b). Third, the report incorrectly identifies a researcher named Anita Chan as one of thirty-four experts with whom GoodWorks spoke. *Id.* ¶ 58(c). Finally, a Stephen Glass piece in *The New Republic* characterizes a photograph under the caption "Andrew Young meeting with plant management and union representatives" as "somewhat misleading" because, as Nike acknowledged, the individuals represented workers but were paid by the plant. *Id.* ¶ 60; *id.* App. 316.

On this basis, Kasky claims that Nike made two false or misleading statements: First, Nike "took out full-page advertisements in major U.S. newspapers (*New York Times*, *Washington Post*, *U.S.A. Today*, *San Francisco Chronicle*, etc.)" in which it quoted the following statement from the GoodWorks report: "Nike is doing a good job...*but Nike can and should do better*." Compl. ¶ 56; *id.* App. 307. (Kasky's complaint, *but not Nike's full-page paid editorial*, omits the second part of the sentence.) Second, CEO Philip Knight stated at the company's 1997 annual shareholders' meeting: "So I think we continue to make good progress, and I think that any independent party will find as Andrew Young [did] that we are operating morally." Compl. ¶ 57; *id.* App. 267.

3. As noted, the counts of Kasky's complaint do not allege that Nike made any of the foregoing statements with reckless disregard for the truth, much less that it purposefully lied or misled. Kasky also pointedly does not allege that any person – including any California resident – relied on any of these statements by Nike in purchasing any Nike product or was otherwise injured in any respect.

Nonetheless, Kasky seeks an injunction requiring Nike "to disgorge all monies which [it] acquired" by selling its products in California in violation of the UCL or the FAL. It would also be required "to undertake a Court-approved public information campaign to correct any NIKE statement and/or claim that th[e] Court" deems false or misleading. Nike also would be subject to a broad injunction barring it from "[m]isrepresenting the working conditions under which NIKE

products are made including, but not limited to, wages, hours, overtime, environmental, health and/or safety conditions, and the use of child labor to produce NIKE products." Kasky does not, however, assert that Nike continues to publish any of the statements he challenges and accordingly does not seek a cease and desist order.

He does demand, of course, that Nike be required to pay his "attorneys' fees and costs." Compl. ¶ 34.

IV. Proceedings Below

The Superior Court held Kasky's complaint barred by the First Amendment as applied by the Fourteenth and the Court of Appeal unanimously affirmed, but a sharply divided California Supreme Court reversed.

1. Petitioner moved to dismiss the complaint on First Amendment grounds. The Superior Court dismissed Kasky's complaint with prejudice and without leave to amend. Pet. App. 80a-81a.

2. The California Court of Appeal affirmed, holding that the statements at issue were fully protected, not commercial, speech. The court explained that "the case at bar lies in familiar First Amendment territory – public dialogue on a matter of public concern. Though drafted in terms of commercial speech, the complaint in fact seeks judicial intervention in a public debate." Pet. App. 75a. The case arose, the court explained, "in the context of a broader debate about the social implications of employing low-cost foreign labor for manufacturing functions once performed by domestic workers," a debate that "has given rise to urgent calls for action ranging from international labor standards to consumer boycotts." *Id.* 76a. Although Nike's statements could affect consumers' purchasing decisions, its speech "cross[es] the boundary between political and private decisionmaking. The citizen may want to translate personal discontent over Nike's labor practices into political action * * *." *Id.* 78a.

The speech that Kasky sought to punish was also distinguishable, the Court of Appeal explained, from representations on public matters that courts have previously deemed "commercial speech." This case does not "concern communications conveying information or representations about specific characteristics of goods," as when a trade association made claims about the effects on health of the cholesterol in eggs. Pet. App. 74a (citing *Nat'l Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157 (CA7 1977)).

The Court of Appeal thus concluded that "the trial court properly sustained the defendants' demurrer without leave to amend." Pet. App. 79a. Kasky had made a "scattershot" attempt to argue that he could amend his complaint "to state a cause of action on some theory allowing content-related abridgement of noncommercial speech." *Id.*; Resp. C.A. Open. Br. 26. But Kasky did not assert that he could plead that Nike had acted with reckless or deliberate disregard for the truth or that he could plead that anyone had relied on Nike's statements, much less that anyone had been injured. The court accordingly saw "no reasonable possibility that [the complaint] could be amended to" satisfy the First Amendment. Pet. App. 79a.

3. Kasky sought discretionary review in the California Supreme Court on a single ground: that the Court of Appeal had erred in deeming Nike's statements fully protected, rather than commercial, speech. He thus did *not* pursue the argument that he could amend his complaint to satisfy the scrutiny applicable to fully protected speech. And once again, Kasky did not allege that Nike spoke with reckless or deliberate disregard for the truth or purposefully lied, or that Nike was even negligent, or that any person had relied on any Nike statement or been injured. According to respondent: "The only question under controlling law is whether Nike's false statements of fact about its own labor practices meet the test or definition of commercial speech." Resp. Pet. for Rev. 16. He framed the issue as "whether Nike's statements satisfy the applicable standards for determining that

expression is commercial speech," acknowledging that "[i]f they do not, then the ultimate issue is resolved in Nike's favor, and the statements are immune from state regulation." Resp. Cal. S. Ct. Open. Br. 1. The state supreme court granted review to decide whether Nike's "statements are commercial or noncommercial speech" (Pet. App. 1a), reasoning that "commercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions" (*id.* 27a).

Dividing four-to-three, the court reinstated Kasky's complaint. The majority rejected Nike's argument that its statements were not "commercial speech" because they addressed matters of public importance, they made no reference to any product or qualities, and they were not in the form of advertisements. The majority held that each of those factors was irrelevant and that Nike's statements are "commercial speech" under a three-part test the majority found "consistent with, and implicit in, [this] Court's commercial speech decisions." Pet. App. 18a.

First, commercial speech is engaged in by a person or entity "engaged in commerce." Pet. App. 18a. Obviously, the majority explained, that is true of Nike. *Id.* 21a.

Second, the "intended audience [of commercial speech] is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." Pet. App. 18a (emphasis omitted). But the sale of products need not be the "*only* purpose" of the speech, so that a statement "primarily intended to reach consumers and to influence them to buy the speaker's products is not exempt from the category of commercial speech because the speaker also has a secondary purpose to influence lenders, investors, or lawmakers." *Id.* 28a (emphasis in original). In this case,

Nike's letters to universities were made "directly to actual and potential purchasers," and Nike's "press releases and letters to newspaper editors, although addressed to the public generally, were *also* intended to reach and influence actual and potential purchasers of Nike products." *Id.* 21a (emphasis added).

Third, "the factual content of the message should be commercial in character" (Pet. App. 19a), which means "it is likely to influence consumers in their commercial decisions" (*id.* 28a). "[T]ypically," such speech "consists of representations of fact about the business operations, products, or services of the speaker * * * made for the purpose of promoting sales * * * or other commercial transactions." *Id.* 19a. These include "statements about the manner in which the products are manufactured, distributed or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service or endorse the product," as well as "statements about the education, experience, and qualifications of the persons providing or endorsing the service." *Id.* In this case, "[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations." *Id.* 22a. Further, "[f]or a significant segment of the buying public, labor practices do matter in making consumer choices." *Id.* 28a.

The majority believed that, because Nike is a commercial entity, its statements about its operations and those of its subcontractors were unlikely to be chilled by government regulation. But consistent with the statutory purpose to "deter" misstatements, the majority reasoned that, "[t]o the extent that application of these laws may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements, these laws will serve the purpose of commercial speech protection by 'insuring that the stream of commercial information flow[s] cleanly as well as freely.'"

Pet. App. 22a (quoting *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976)).

4. Three justices dissented. They concluded that Nike's statements were fully protected as speech on an important public issue. "Nike's labor practices and policies, and in turn, its products, *were* the public issue." Pet. App. 37a (Chin, J.) (emphasis in original). As Justice Brown explained:

> Nike faced a sophisticated media campaign attacking its overseas labor practices. As a result, its labor practices were discussed on television news programs and in numerous newspapers and magazines. These discussions have even entered the political arena as various governments, government officials and organizations have proposed and passed resolutions condemning Nike's labor practices. Given these facts, Nike's overseas labor practices were undoubtedly a matter of public concern, and its speech on this issue was therefore "entitled to special protection."

Id. 55a-56a (quoting *Connick* v. *Myers*, 461 U.S. 138, 145 (1983)). In these circumstances, "Nike could hardly engage in a general discussion on overseas labor exploitation and economic globalization without discussing its own labor practices." *Id.* 43a (Chin, J.).

The majority's legal regime, the dissenters explained, chills speech on this important issue. "[T]he corporation [can] never be sure whether its truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue." Pet. App. 49a (Brown, J.). Further, the majority's ruling distorts the marketplace of ideas by discriminating against a particular viewpoint. "Under the majority's test, only speakers engaged in commerce are strictly liable for their false or misleading representations * * *. Meanwhile, other speakers who make the same representations may face no such liability, regardless of the context of their statements." *Id.*

"Handicapping one side in this important worldwide debate is both ill considered and unconstitutional. *Id.* 31a (Chin, J.).

Nor, the dissenters explained, could the majority's approach be sustained by analogy to regulations of commercial advertising and labeling. Nike's statements were not made in "product labels, inserts, packaging, or commercial advertising intended to reach only Nike's actual or potential customers." Pet. App. 34a (Chin, J.). Indeed, such restrictions on commercial speech had previously been sustained because businesses remained free to speak on all these public issues in other fora. "By contrast, Nike has *no* other avenue for defending its labor practices, given the breadth of" California's UCL and FAL. *Id.* 59a (Brown, J.).

5. This Court granted certiorari. 123 S. Ct. 817 (2003).

SUMMARY OF ARGUMENT

I. The California Supreme Court erred in holding that commercial speech encompasses everything said by anyone "engaged in commerce," to an "intended audience" of "potential * * * customers" or "persons (such as reporters * * *)" likely to influence actual or potential customers, that conveys factual information about the speaker "likely to influence consumers in their commercial decisions." Pet. App. 18a, 28a. Each of the three tests articulated by this Court for identifying "commercial speech" not only precludes the California court's holding but also establishes that petitioner's speech was fully protected. Petitioner's statements did not merely "propose a commercial transaction" (*United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001)), did not "relate[] solely to the economic interests of the speaker and its audience" (*Cent. Hudson Gas & Elec. Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)), and did not exhibit two of the three principal features that, when found in "combination," indicate that speech is "commercial": (1) advertising format; (2) explicit reference to a product; and (3) economic motivation (*Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S 60, 69 (1983)).

Nor can the commercial speech doctrine be extended so broadly as to sustain the California Supreme Court's ruling. In recognizing the category of "commercial speech," this Court did not carve out a segment of fully protected speech for lesser protection, but rather extended the First Amendment's ambit to encompass communication that otherwise would be regarded as within government's extensive authority to regulate commerce. Compare *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) with *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Although commercial speech is thus protected, this Court has concluded that it lacks the full communicative value of fully protected speech, through which speakers engage in a vigorous exchange of viewpoints. The decision below is nonetheless targeted at fully protected speech on matters of great public importance – typified by this dispute over labor conditions – for it is those issues that are likely to influence consumer choices. *Thornhill* v. *Alabama*, 310 U.S. 88, 102-03 (1940).

The California Supreme Court's ruling also omits a defining feature of commercial speech under this Court's precedents: the regulation of speech must have a direct nexus to government regulation of commerce. *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The California court's conclusion that government may regulate all statements of fact by commercial entities that could influence consumers sweeps far too broadly, for "[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." *Thornhill* v. *Alabama*, 310 U.S. at 104. Relatedly, California's regulation is principally concerned with moral judgments that only indirectly affect consumer behavior and thus does not seek to ameliorate "commercial harms" as required by this Court's precedents. *E.g.*, *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410 (1993).

II. Even if petitioner's statements could be characterized as "commercial speech," the legal regime approved by the

California Supreme Court violates the First Amendment. The court plainly erred in holding that government has a free hand in adopting any regulatory scheme, however onerous, so long as it directly penalizes only false or misleading commercial speech. This Court has repeatedly held that imposing liability for speech on matters of public importance without fault or on a mere showing of negligence presents too great a risk of chilling fully protected expression. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The California regime inevitably inhibits such speech, in no small part because it is calculated and applied by the courts of that state to "deter" misstatements, through such means as the elimination of any defense of good faith and any requirement, as a prerequisite to bringing suit and securing potentially crushing relief, that someone have been injured. A corporation's statements around the world in any forum are subject to the *Kasky* regime if received in California, and a commercial entity can have no confidence that those statements will later be deemed by a state court to be entirely truthful. Notably, the speech subject to prohibition and punishment under the decision below lacks either of the features – an essential contribution to the speaker's financial bottom-line and easy verification – that have led this Court to conclude that traditional advertising is not unduly chilled by government regulation.

This is accordingly an *a fortiori* case for the application of the prophylactic regime applied by this Court in contexts in which government seeks to regulate speech on matters of public concern. Liability may not be imposed without fault. Nor may relief be sought by a "private attorney general" – who has no personal knowledge of the truth of his allegations and has not been injured – on behalf of an indeterminate class of persons who have themselves suffered no harm. Government may not assume the role of arbiter of truth unless necessary to advance an important government interest, features that the California scheme lacks.

ARGUMENT

I. The Power California Asserts To Restrict Speech On Matters Of Public Importance, Untethered To Regulation Of Commercial Transactions, Finds No Refuge In This Court's Jurisprudence.

The California Supreme Court defined "commercial speech" to cover everything said by anyone "engaged in commerce," to an "intended audience" of "potential * * * customers" or "persons (such as reporters * * *)" likely to influence actual or potential customers that conveys factual information about itself "likely to influence consumers in their commercial decisions." Pet. App. 18a, 28a. It matters not in what *form* the speech appears – *i.e.*, on a product label, in an advertisement, or in a newspaper editorial. Nor does it matter whether the speech addresses the qualities of a product as such (like its price, availability, or suitability) or instead addresses only a burning social issue. Under California law as construed below, Nike's statements in *The New York Times* about labor conditions in its Southeast Asia factories have no more protection under the First Amendment than a supermarket flyer advertising Nike "Shox" shoes for $69.

Although the California court characterized that result as "consistent with" and "implicit in" this Court's decisions (*id.* 18a), it cannot be seriously argued that such a novel conception of commercial speech meets the criteria set out in this Court's precedents. See Part I-A, *infra*. Nor can those precedents be stretched to accommodate this ruling without abandoning all hope of cabining the commercial speech doctrine. See Part I-B, *infra*.[3]

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[3] Because the California decision extends beyond economic information that is essential to sales and that is easily verified, it lacks the "anti-freeze" that this Court has suggested prevents traditional commercial advertising from being chilled by government regulation. See Part II, *infra*.

A. This Court's Decisions Reject The California Supreme Court's Definition Of "Commercial Speech."

Having said over a decade ago that "*the test* for identifying commercial speech" is whether it proposes a commercial transaction (*Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989) (emphasis added)), this Court has rendered several even more definitive rulings "usually defin[ing] [it] as speech that does *no more than* propose a commercial transaction" (*United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added)). See also, *e.g.*, *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993). The California Supreme Court, by contrast, omitted any requirement that the speech make a commercial proposal at all, much less that it do so exclusively. The decision below thus flatly conflicts with this Court's precedents.

Nor does the California court's ruling accord with this Court's earlier characterization of commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). To the contrary, the decision below implicates economic interests only secondarily; its principal concern is with consumers who purchase (or boycott) goods for *non*-economic reasons. And, beyond purchasing decisions altogether, readers sensitized to labor issues "may want to translate personal discontent over Nike's labor practices into political action" (Pet. App. 78a (Court of Appeal)), as Justice Brown recognized in citing press reports of Nike critics lobbying for measures restricting sales of its products (*id.* 55a-56a (dissent)). Nor was Nike's *own* motivation for speaking "solely" economic – except in the sense that virtually *everything* a company does is ultimately intended to improve its financial bottom line. Nike was also concerned by the prospect of government action restricting foreign investment or condemning the company,

and with reduced employee morale.[4] Yet the California court deemed it irrelevant that Nike's statements were "addressed to the public generally" (*id.* 21a) and sought to "influence lenders, investors, or lawmakers" (*id.* 28a).

The court pronounced its decision reconcilable with yet a third test for identifying commercial speech: *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S 60 (1983), concluded that a pamphlet advertising condoms was commercial speech based on three factors in "combination": (1) advertising format; (2) explicit reference to a product; and (3) economic motivation. 463 U.S. at 66-67 & n.13. Despite the fact that the *Bolger* pamphlet was concededly an advertisement, the California Supreme Court deemed the format – and the forum – of a statement irrelevant. That cannot be right, for among the premises of the commercial speech doctrine is that an advertisement has less communicative value than a statement

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[4] *E.g.*, *March Down Fifth Avenue in New York City Protesting the Use of Child Labor Abroad to Make Products Which American Consumers Buy Relatively Cheap* (Nat'l Pub. Radio broadcast, Dec. 11, 1998) (linking proclamation by President Clinton urging "an end to sweatshop conditions both in the United States and abroad" to protests against Nike); Bernie Sanders, *Webwire – Nike Corporate Practices Come Under Attack*, Congressional Press Release, Oct. 24, 1997 (reporting on letter from 53 U.S. congressional representatives seeking meeting with Nike to address overseas labor issues and asserting that "Nike believes that workers in the United States are good enough to purchase [its] shoe products, but are no longer worthy enough to manufacture them"); Paula L. Green, *Nike, Jordan Challenged on Conditions Indonesian Worker in Court Battle*, J. of Commerce, July 25, 1996, at 3A (describing efforts to pressure Nike by, *e.g.*, an AFL-CIO youth group and Rev. Jesse Jackson, as well as attempts to link issue to "crusade" by U.S. Department of Labor to eliminate domestic sweatshops); Robin Bulman, Editorial, *Nike's Tainted Cash?*, J. of Commerce, July 23, 1996, at 7A (reporting on resolution of Portland Metropolitan Human Rights Commission urging local school board to decline Nike donation of $500,000 to cover budget shortfall on the basis of "alleged human rights abuses by the company's overseas suppliers").

with the same message contained in a newspaper editorial that plays a role in broader public discussion.

Just as important, the California court proceeded from a vastly overblown conception of "product references." The *Bolger* advertisement promoted purchases of the speaker's products to prevent disease by *referring* to those products both generically (as condoms) and specifically (by name). 463 U.S at 66-67 & n.13. An analogue in this case would be a traditional ad with the Nike logo touting running shoes. But in an Orwellian *ipse dixit*, the California Supreme Court held that "product references" require *no* reference to *any* product, instead encompassing every factual statement a business makes about its operations or the conditions in which employees supplying its firms work. Pet. App. 19a. Respondent's complaint, for example, does not assert that any statement by Nike about its products was false or misleading; nor do any of the statements complained of even refer to the characteristics (such as price, availability, or suitability) of Nike's products.

The decision below can therefore be sustained only if this Court adopts yet a *fourth* definition of "commercial speech" – one that dramatically expands the doctrine's scope. As petitioner now shows, such a new definition would conflict with basic First Amendment principles.

B. The Extension Of The Commercial Speech Doctrine Embraced Below Is Divorced From The Doctrine's Theoretical And Practical Underpinnings, Discriminates Based On Viewpoint, And Does Not Prevent Or Redress "Commercial Harms."

1. The California Supreme Court's Authoritative Construction Of The State's Statutes Targets Speech On Matters Of Public Concern Lying At The Core Of The First Amendment.

In expanding the commercial speech category beyond all previously accepted bounds, the California Supreme Court paid no serious heed to the underpinnings of the commercial speech doctrine, which *extended* the First Amendment's protective ambit a quarter of a century ago to expression that had for some time been deemed to fall within government's power to control commerce itself, and thus had received essentially no First Amendment protection at all. Government's relatively free-hand in regulating commercial activity ever since *Lochner*'s demise had been thought to extend not just to the speech that is itself a "component of that activity" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)) – as when contractual offers are enforced – but also to speech that merely *promotes* or otherwise intrinsically *relates to* such activity. See, *e.g.*, *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). That leap was subject to a significant course correction in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976), which extended First Amendment protection to "commercial speech," as typified by statements regarding "who is producing and selling what product, for what reason, and at what price."

This Court recognized in *Virginia State Board* and its progeny that "commercial speech" has constitutionally significant value *to listeners* and therefore merits protection

under the First Amendment. "Advertising, though entirely commercial, may often carry information of import to significant issues of the day." And commercial speech informs "the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (citations omitted). But the Court has, thus far, declined to extend *full* First Amendment protection to commercial speech on the ground that, although it has substantial value for listeners, it has been thought to lack the communicative value of fully protected speech to the speaker and to society generally and in that sense has been said to make less of a "direct contribution to the interchange of ideas." *Va. Pharmacy Bd.*, 425 U.S. at 780. By contrast, through fully protected speech, individuals participate in the polity, expressing views and engaging in debate that collectively makes up the nation's social and political consciousness, triggering our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). This Court has "frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (citation omitted).

The California court's decision is irreconcilable with this Court's precedents because it subjects to suit, and exposes to potential prohibition and devastating financial sanctions, speech that contributes to public understanding of important social issues where the justification for governmental regulation is at a minimum because the context is "conducive to rational and considered decisionmaking" (*Edenfield*, 507 U.S. at 775) and bears only a tangential relation to commercial transactions. The ruling below deems statements on matters of public importance to be "commercial speech" whenever they involve the company's business practices and

might influence consumers who adhere to what the literature calls "ethical purchase behaviour," which posits that some consumers purchase products based not just on price and quality but also on their "*moral* judgment" about the *seller*. N. Craig Smith, *Morality and the Market* 177 (1990) (emphasis added).

That theory cuts the heart out of the First Amendment's protections for statements by commercial entities on nearly *every* public issue – from a company's diversity policy to its community relations efforts to its political activities – all of which can be said to "matter in making consumer choices" (Pet. App. 28a). The decision below thus swallows up public discussion of *all* "matter[s] of political, social, or other concern to the community," as distinguished from the narrow categories of "matters only of personal interest" (*Connick* v. *Myers*, 461 U.S. 138, 146-47 (1983)) and of "speech solely in the individual interest of the speaker and its specific business audience" (*Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (plurality)).

This case makes the point perfectly. Unlike a traditional false advertising complainant, Kasky does not claim that petitioner misled consumers into believing that Nike offers them a "better deal," that its products are better made, or even that they are "cooler" than the competition's. Rather, he claims that petitioner's labor practices in Southeast Asia raise so important a social issue that citizens make moral judgments on that basis about Nike, and that those judgments, in turn, influence their purchasing decisions.

But that simply shows why this case belongs at the very core of the First Amendment's protections: It presents a classic dispute between business and labor of the precise sort that this Court in *Thornhill* v. *Alabama*, 310 U.S. 88, 103 (1940), located squarely "within that area of free discussion that is guaranteed by the Constitution," reasoning that "labor relations are not matters of mere local or private concern," and that "[f]ree discussion concerning the conditions in

industry and the causes of labor disputes [is] indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.* Debates in that arena inevitably produce "bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions." *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 58 (1966). If the full protections of the First Amendment apply to the allegations of Vietnam Labor Watch, the Hong Kong Christian Industrial Committee, and the Dong Nai Confederation of Labor underlying respondent's complaint, as well as to a widely publicized address of the President of the AFL-CIO claiming that a Nike contractor "pays workers as low as 16 cents an hour for 77- to 84-hour weeks and fires them if they refuse overtime" (*Big Labor Rips Nike at Big PR's Annual Outing*, O'Dwyer's PR Services Report, July 1998, at 1), and to Bob Herbert's columns asserting that "the cries of the oppressed * * * suit [Nike]" (*In America; Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, § A, at 29), so too they apply when Nike *responds* to those allegations.

The irony of the California Supreme Court's decision is palpable. A plaintiff like Kasky can bring suit on the basis of allegations that arise not from his or her personal knowledge but from press reports describing the public exchange of accusations against, and responses by, a company.[5] Under the

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[5] See Compl. ¶ 29 & App. 133-34 (CBS News); *id.* ¶ 45 & App. 170-71 (statement in *The Oregonian*); *id.* ¶ 52 & App. 285 (letter to editor of *The New York Times*); *id.* ¶ 56 & App. 307 (paid editorial on GoodWorks International report); *id.* ¶ 60 & App. 316 (*New Republic*); *id.* ¶ 29 (ESPN). See also, *e.g.*, Tunku Varadarajan, *Nike Audit Uncovers Health Hazards at Factory*, Times (London), Nov. 10, 1997; Danielle Knight, *Labor-Environment: Shoe Plant Called Unsafe for Workers*, Inter Press, Nov. 10, 1997; and *Nike Plant Conditions in Vietnam Hit in Audit*, Reuters, *reprinted in* Chicago Tribune, Nov. 10, 1997, at 12 (discussing Ernst & Young report); William Branigin, *Clinton, Garment Makers Hail Accord on Sweatshops; Critics Say Pact Falls Short on Key Work Issues*, Wash. Post, Apr. 15, 1997, § A, at A10; and *Nike Contractors Accused of Worker Abuse,* Assoc. Press, Mar. 29, 1997, at A49 (discussing allegations of Thuyen Nguyen); Nat Hentoff, Op-ed, *The Trouble With Role Models*, Wash. Post, Oct. 25, 1997, at A19; and Brad Knickerbocker, *Nike Fights Full-Court Press on Labor Issue*, Christian Science Monitor, Sept. 23, 1997, at 9 (discussing allegations of Hong Kong Christian Industrial Committee).

decision below, the more important the issue, the more likely it is to influence consumers and thus, perversely, the more likely it is that speech on the issue will give rise to liability.

To be sure, advertising does not receive the full protections of the First Amendment when it merely uses the *artifice* of "link[ing] a product to a current public debate." *Cent. Hudson Gas & Elec. Co.*, 447 U.S. at 563 n.5. See also, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of Ohio Supreme Court*, 471 U.S. 626, 637 n.7 (1985). But, as this Court recognized in *Bolger*, the state's augmented power to regulate commercial speech coexists with the principle that speech on matters of public importance (including that by corporations) loses none of its protection by virtue of the fact that it may alter consumer behavior. 463 U.S at 86. Indeed, it is precisely *because* "[a] company has *the full panoply of constitutional protections* available to its *direct comments on public issues*, [that] there is no reason for providing similar constitutional protection when such comments are made in the context of commercial transactions." *Id.* at 68 (emphasis added). Thus, when a corporation's statements on public issues do not appear in "commercial speech" as defined by this Court's precedents – which petitioner's statements plainly do not under any of the three tests announced by the Court (see Part I-A, *supra*) – they are fully protected by the First Amendment.[6]

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[6] *Bolger* relied on two companion decisions authored by Justice Powell. *Central Hudson* held that a power company's *advertising* which discussed, and was designed to promote, electric power consumption was "commercial speech" notwithstanding that electricity consumption is an important public issue. 447 U.S. 557. *Consolidated Edison*, decided the same day, held that a pamphlet

2. The Application Of The California Statutes To Public Statements Unrelated To Advertisements And Representations Of Product Qualities Lacks The Required Nexus To A State Regulatory Scheme And Amounts To Impermissible Viewpoint Discrimination.

This Court has declined to extend the full protections of the First Amendment to commercial speech for the further reason that, because advertising does not ordinarily generate the intense media scrutiny and public discussion and reflection typically associated with editorials and other speech on social, political, and moral matters of public moment, direct government regulation may be the only mechanism to ensure that consumers receive accurate information about the products and services they might wish to purchase. It is thus "the State's interest in regulating the underlying transaction" that "give[s] it a concomitant interest in the expression itself" (*Edenfield*, 507 U.S. at 767) and the power to "deal effectively with false, deceptive, or misleading sales techniques" (*Bolger*, 463 U.S at 69).

The commercial speech doctrine's status as an outgrowth of government's nearly plenary authority to regulate commercial transactions has given rise to a "'commonsense distinction'" in this Court's cases "between speech proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (emphasis added). "*By definition*," the Court has explained, "commercial speech is linked *inextricably* to commercial activity." *Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979) (emphasis added). The state's power over the latter carries a "concomitant power" to

containing factual statements on matters such as the use of nuclear power was fully protected as within "'the arena of public discussion'" (447 U.S. at 534), even though the statements could no doubt influence consumers' choices.

regulate the former. *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 499 (1996) (plurality).[7]

This defining linkage is completely absent from California's asserted power to control "commercial speech." The speech targeted for regulation by the ruling below is not tethered to the state's authority to regulate commercial transactions. Although petitioner sells products in California, no resident of that State need have purchased any product manufactured by Nike in Southeast Asia for *Kasky* liability to attach. Nor does the mere fact that petitioner is a commercial entity whose in-state sales are regulated by the State of California strip petitioner's speech of full constitutional protection. Nike's status as a corporate speaker is immaterial, for "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978). And "[s]ome of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 482 (1989).

Obviously, California could not (*Zschernig* v. *Miller*, 389 U.S. 429 (1968)) assert regulatory authority to influence working conditions in Southeast Asia. Even outside the realm of foreign affairs, a state may not regulate speech in order to advance its policies – such as a desire to improve perceived factory conditions – in other jurisdictions. In *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), for example, Virginia sought impermissibly to invoke a state "interest in regulating what

[7] Compare the way in which state economic regulation may generate a need for jointly funded information services (see *Glickman* v. *Wileman Bros.*, 521 U.S. 457 (1997) (upholding state-coerced funding without First Amendment scrutiny)), while state-coerced funding of generic ads decoupled from substantive economic regulation is subject to strict First Amendment scrutiny (see *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (striking such state-coerced funding down)).

Virginians may hear or read about * * * New York [abortion] services * * * [to] shield[] its citizens from information about activities outside Virginia's borders, activities that Virginia's police powers do not reach." *Id.* at 827-28.

California is accordingly relegated to asserting a purely speech-based regulatory interest in policing all statements of "fact" by a commercial entity about its operations that are "likely to influence California consumers in their commercial decisions." Pet. App. 28a. But the protection afforded to discussion of matters of public importance certainly extends to such statements of "fact." Facts are the bedrock on which judgments about public issues are reached. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues 'about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Bellotti*, 435 U.S. at 776 (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940)). A contrary rule would produce "innocuous and abstract discussions" and, because the line between fact and opinion is so hazy, would "so becloud even this with doubt, uncertainty and the risk of penalty" that "freedom of speech * * * [would] be at an end." *Thomas* v. *Collins*, 323 U.S. 516, 536-37 (1945).

Thornhill v. *Alabama*, 310 U.S. 88 (1940), is very much on point. It involved labor picketing that sought "to advise customers and prospective customers" regarding labor conditions "and thereby to induce such customers" to change their purchasing decisions. *Id.* at 99. This Court rejected the view that any such effect on consumers could trigger the state's regulatory authority over speech, reasoning that "*[e]very* expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." *Id.* at 104 (emphasis added). Although government has ample authority "to set the limits of permissible contest open to industrial combatants," "[i]t does not follow that the State * * * may impair the effective exercise of the right to discuss freely industrial

relations which are matters of public concern." *Id.* Presaging this very case, the Court explained that "[a] contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society." *Id.* That is particularly true where, as here, government seeks to regulate "nearly every practicable, effective means whereby those interested * * * may enlighten the public." *Id.*[8]

The California Supreme Court seemed principally motivated by a desire "to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller." Pet. App. 20a. But the commercial speech doctrine needs no expansion to accommodate government's legitimate interest in regulating "image campaigns." Many "image *advertisements*" are commercial speech in the classic sense. Nor, as we have noted, may an advertiser circumvent the commercial speech doctrine through the nicety of "link[ing] a product to a current public debate." *Cent. Hudson Gas & Elec. Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980). And the fact that some "image campaigns" fall outside the "commercial speech" category does not render

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[8] The California Supreme Court expressly declined to follow *Thomas* and *Thornhill* on the ground that they had been superseded by "the modern commercial speech doctrine." Pet. App. 24a. But this Court has cited *Thornhill* and *Thomas* favorably more than 125 times, often in leading free speech precedents. In particular, those decisions undergird the recognition of the First Amendment right to speak on matters of public importance, including the right to engage in social protest. *E.g.*, *Meyer* v. *Grant*, 486 U.S. 414, 421 (1988); *Pac. Gas & Elec. Co.* v. *Pub. Utils. Comm'n*, 475 U.S. 1, 8-9 (1986); *FCC* v. *League of Women Voters*, 468 U.S. 364, 381-82 (1984); *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 534-35 (1980); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665, 705 n.40 (1972); *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). See generally Pet. for Cert. 18 & nn.5-7.

them altogether immune either from regulation or from the marketplace consequences of whatever misstatements are uncovered.

Nor has a new and more expansive view of government's regulatory authority been shown necessary to protect consumers, given how readily matters of public importance that concern consumers draw media attention. The media and the internet provide innumerable outlets through which the Kaskys of the world may voice their accusations – accusations to which corporations already feel pressure to respond. And those responses do not go unexamined. When they are revealed in the press to be false or misleading, those responsible are likely to suffer not just embarrassment but substantial losses in sales. That prospect, in turn, gives companies a powerful incentive to ensure that they speak accurately. The proper operations of the marketplace of ideas and the marketplace of goods are thus mutually reinforcing.[9]

The fact that the California Supreme Court eschewed the required nexus between government's regulation of commerce and its power to regulate commercial speech gives rise to a further constitutional infirmity that itself requires reversal. Traditional governmental regulation of commercial advertising applies neutrally to the class of statements on

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[9] The Court can safely leave for another day the question whether special circumstances might justify the state's extension of its authority over commercial speech beyond statements that appear in advertisements or that are otherwise integrally related to an underlying regulated transaction or the consumer qualities of a product. The California Supreme Court did not limit its decision to statements by corporations that require close regulation because they naturally invite exceptional reliance by consumers. In any event, Nike sells athletic apparel, which is not subject to a special regulatory regime in California or any other state. Contrast the securities laws, for example, where government may have a freer hand in regulating financial statements that are immediately incorporated by financial markets into stock prices. *SEC* v. *Wall St. Publ'g Inst.*, 851 F.2d 365 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

which consumers directly rely in making purchasing decisions. By contrast, the UCL and FAL apply to commercial sellers but *not* to persons and entities that launch accusations against those sellers – despite the fact that the accusations appear in the identical fora and have an indistinguishable effect on consumer behavior. The government's power "to regulate price advertising in one industry but not in others, because the risk of fraud * * * is in its view greater there" does *not* imply the power to engage in "viewpoint discrimination." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 388-89 (1992). To the contrary, "discrimination between commercial and noncommercial speech" is forbidden as a form of viewpoint-based censorship when, as in this case, "the distinction bears no relationship *whatsoever* to the particular interests that the [government] has asserted." *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410, 424 & n.20 (1993). That rule respects the basic First Amendment principle that "[t]here is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972).

3. California's Effort To Ensure The Integrity Of The Moral Judgments Of Its Consumers Is Not Directed At "Commercial Harms" As Required By This Court's Precedents.

California's legal regime conflicts with this Court's commercial speech precedents for the further reason that it does not seek to prevent or redress "commercial harms" (*Discovery Network, Inc.*, 507 U.S. at 426) within the meaning of this Court's decisions. There is no suggestion that consumers received Nike products of lesser quality or at a higher price than they bargained for, much less that they bought Nike products that were in any respect defective or dangerous; indeed, none of the statements on the basis of which the court below has held petitioner liable to suit even addressed such matters. The court's theory was instead that

all Nike statements about itself capable of influencing consumers' moral judgments might affect their purchasing decisions and are accordingly fair game for the litigation mill.

If the asserted tie-in between a state's regulatory power and the moral conclusions of consumers ever suffices to convert discussion of public issues into lesser protected "commercial speech," that can only be in the context of direct product advertising and product labels, which are least likely to generate reasoned discussion and which are targeted at consumers and affect purchasing decisions in the first instance and shape broader moral judgments only secondarily. In those limited circumstances, regulation by the state might seek to prevent "false, deceptive, or misleading sales techniques" (*Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S 60, 69 (1983)). But speech of the sort at issue in this case shapes moral conclusions in the first instance and affects purchasing choices only secondarily, if at all. There is only the most attenuated link between public statements on important social, political, and moral issues – which generate heated responses and debate – and consumer purchasing decisions. When the plaintiff's theory depends on fundamentally moral judgments made on the basis of such public debate, the link to the government's regulatory authority required by the commercial speech doctrine is broken.

* * * *

For the foregoing reasons, the judgment below must be reversed because petitioner's statements cannot be deemed "commercial speech" by reference either to the definitions articulated by this Court or to the doctrine's underpinnings. Respondent has definitively conceded that his suit must be dismissed if petitioner's speech is properly characterized as anything other than *false or misleading commercial speech.* As petitioner now shows, the judgment must also be reversed because, whether or not petitioner's speech is deemed

"commercial," the scheme of regulation approved by the California Supreme Court violates the First Amendment.

II. Even As Applied To Speech Properly Deemed "Commercial," The Legal Regime The California Supreme Court Constructed In This Case Stifles Speech In Violation Of The First Amendment.

The California Supreme Court brought its First Amendment inquiry to a close once it concluded that petitioner's statements were all properly characterized as "commercial speech." The court deemed state regulation targeted at "commercial speech that is false or misleading" to be immune from constitutional challenge on the theory that such speech is, by definition, "not entitled to First Amendment protection and 'may be prohibited entirely'" (Pet. App. 10a (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982))), with the asserted consequence that the speech regulated by the UCL and FAL "receives *no protection* under the First Amendment, and therefore a law that prohibits only such unprotected speech *cannot violate constitutional free speech provisions*" (*id.* 27a (emphases added)). That is a massive *non sequitur*: It skips entirely over the vital question whether the *means* government employs in its campaign to eliminate false commercial statements sacrifice too much truthful, and thus protected, speech to withstand First Amendment scrutiny. As this Court said in a related context, "Such a simplistic, all-or-nothing approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 384 (1992).

"Regardless of the particular label asserted by the State – whether it calls speech * * * 'commercial' or 'commercial advertising' or 'solicitation' – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow* v. *Virginia*, 421 U.S. 809, 826 (1975). When, as with UCL and FAL suits like Kasky's,

government's attempt to regulate assertedly false speech on matters of public importance would chill much communication that is truthful and fully protected by any measure, the First Amendment imposes on the plaintiff the heightened burdens of proving injury; of establishing by clear and convincing evidence that the defendant spoke with at least reckless indifference to the truth; and of showing that the state's scheme is not skewed against a set of speakers or of views – burdens Kasky cannot satisfy.

A. The Decision Below Will Inevitably Limit Expression By Commercial Entities Throughout The World, Which Rightly Fear Being Subjected To Wholly Unpredictable And Potentially Crushing Suits.

The California Supreme Court's ruling in this case reflects that court's commitment to construe the already broad terms of the UCL and FAL as expansively as possible in order to "effectuate the [statutes'] full deterrent force." *Fletcher* v. *Sec. Pac. Nat'l Bank*, 591 P.2d 51, 57 (Cal. 1979). That "deterrence" rationale is shorthand for a policy of making commercial actors reticent to speak until they are virtually certain that all their remarks will in hindsight be found truthful – indeed, that they will on their face be so far beyond dispute that any suit asserting the contrary would be immediately dismissed as spurious – manifestly an inordinately difficult standard to meet in the context of an ongoing public debate. Although nominally directed only at "false" and "misleading" statements, such a broad prophylaxis, this Court has repeatedly held, inevitably tends to "chill" truthful expression, for "[p]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

The chilling effect of the legal regime approved by the court below is fact, not hypothesis or prediction. Nike has determined on the basis of this suit that the very real prospect

that a California resident will take it upon him or herself to dispute the veracity of one of the company's statements in a California court requires petitioner to restrict severely all of its communications on social issues that could reach California consumers, including speech in national and international media. Among other things, petitioner has prepared an annual Corporate Responsibility Report – the company's single most important document describing its initiatives and progress on matters such as labor compliance, community affairs, sustainable development, and workplace programs, and a document that is widely used as a model by other corporations – but recognizes that the company's critics would inevitably seize upon the opportunity to force it to defend every statement in the report in court, notwithstanding the enormous media scrutiny to which all those statements will already be subject. Because the UCL and FAL apply to *all* statements received in California, including those reaching it through the internet, Nike cannot place a cone of silence over that one State but must instead refrain from releasing its report *anywhere in the world.* Nike also declined to participate this year in the *Dow Jones Sustainability Index*, an important worldwide measure of corporate responsibility practices, and in the months since the California Supreme Court decided this case, it has felt obliged to decline dozens of invitations (most of them outside California) to speak on corporate responsibility issues that it had openly addressed in years past and that it would continue to discuss now were it not for the imminent prospect of inviting still further costly litigation under the *Kasky* regime – a prospect that clouds a corporation's discussion of virtually any topic somehow related to its business practices that might conceivably matter to citizens as consumers, including (but not limited to) labor conditions, environmental impact, responsible investment and divestment practices, and community involvement, even when the company speaks in the heat of public controversy.

Even beyond the chilling effect on reports long in the making and detailed in the information they provide to the

public, companies are invariably hesitant to react when called on, as Nike has been here, to make on-the-spot responses to accusations – in this case, accusations about the more than half-million individuals employed not by it but by its subcontractors halfway around the world. Those responses will predictably be chilled first by delay while the speaker seeks to verify all the facts, and then by silence inasmuch as *no* degree of effort suffices to protect the speaker from the strict liability of California law. The application of the UCL and FAL authoritatively approved in this case thus extends California's assertion of authority well beyond its regulation of traditional advertising – advertising that, because statements about qualities of the "product and its price" are subject to ready verification *ex ante* and because advertising is generally prepared not on short notice but well in advance of publication, is less likely to be chilled. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 495 (1995) (Stevens, J., concurring) (quoting *Va. Pharmacy Bd.*, 425 U.S. at 777-78 (Stewart, J., concurring)).

For similar reasons, the California legal regime – by reaching speech *in any format and in any forum*, so long as it is received in California – is far more likely to inhibit truthful communication than is regulation of speech relating to specifically identified matters that are entirely within the corporation's control, such as a label stating that a specific product is "Made in the U.S.A." Indeed, the majority below went so far as to hold that the First Amendment does not protect even statements made to "persons (such as *reporters* or *reviewers*) [who are] likely to *repeat* the message to or otherwise influence actual buyers or customers." Pet. App. 18a (emphases added). Unable to know *ex ante* whether a press account will carry remarks accurately or completely, a corporation would be foolish to continue to provide information freely to the media. Kasky's suit against Oregon-based Nike over statements made to *The New York Times* regarding commercial production in Southeast Asia is obviously just the beginning, for the decision below applies

equally to statements by European and Asian manufacturers carried in *The Economist*, *The Asian Wall Street Journal*, and *The International Herald Tribune*. To leave standing a ruling permitting a state to "exert the power sought here over a wide variety of national publications or interstate newspapers carrying [speech] * * * would impair, perhaps severely, the[] proper functioning" of the press and the free exchange of ideas. *Bigelow* v. *Virginia*, 421 U.S. 809, 828-29 (1975).

Kasky liability also attaches to entirely truthful communications that, although making a valuable contribution to public understanding and discussion, have less value to a corporate speaker's bottom line than the nuisance cost of litigating the issue in the California courts at the insistence of any single dubious resident of that state. A corporation faced with the prospect of *post hoc* strict liability in an uncertain but potentially staggering amount can forgo, or at the least substantially limit, speech on broader social and moral issues. Expression on matters of corporate responsibility in particular has a much more tenuous connection to a corporation's economic success than its commercial "*advertising*," which "is the *sine qua non* of commercial profits" and therefore bears "little likelihood of its being chilled by proper regulation and foregone entirely." *Va. Pharmacy Bd.*, 425 U.S. at 772 n.24 (emphasis added).

The profound reticence to speak on social, political, and moral issues that the *Kasky* regime instills in commercial entities is greatly magnified by the fact that statements made in the course of public controversies may be condemned as misleading, and thus actionable under the UCL and FAL, simply because they allegedly "omit" any of an entirely indeterminate range of supposed "facts." *E.g.*, *Cortez* v. *Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 169 (Cal. 2000); *Comm. on Children's Television, Inc.* v. *Gen. Foods Corp.*, 35 Cal. 3d 197, 213 (Cal. 1983). A commercial advertisement might reasonably be deemed misleading by omission without chilling much valuable speech when that advertisement, for example, fails to disclose a material term

of a commercial offer for sale. But California law as applied in this very different circumstance permits respondent to argue that, when Nike made even the most generalized and literally truthful statements that the company seeks to ensure safe working conditions at contract facilities, its failure to disclose simultaneously that a report in December 1996 found that some workers had been exposed to unsafe conditions at the Tae Kwang Vina Industrial Ltd. Co. plant in Bien Hoa City, Vietnam was actionable. See Compl. ¶ 58(b). It is literally *impossible* for a company to engage in public communication about itself on matters of social importance with any confidence that the population of California will be satisfied that the company's disclosures are entirely truthful and complete. "Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." *Central Hudson*, 447 U.S. at 562.

A commercial entity cannot retreat from the statements of fact formally encompassed by the UCL and FAL to the most banal statements of pure opinion that even the California Supreme Court acknowledged were fully protected by the First Amendment. If government may restrain statements of fact and thereby reduce public discourse "to innocuous and abstract discussion" about social issues, "freedom of speech will be at an end." *Thomas* v. *Collins*, 323 U.S. 516, 536-37 (1945). Indeed, because "expressions of 'opinion' may often *imply* an assertion of objective fact" – a truism that has caused this Court squarely to reject such an "artificial dichotomy" (*Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (emphasis added)) – a company operating under the pall of *Kasky* liability simply cannot express its "opinion" in any way that will actually communicate valuable information without constant concern about being haled into a California court and held liable for an incalculable amount.

In this case, for example, for petitioner to answer effectively the claim that "Nike exemplifies the harms of globalization because it underpays workers," it must do more

than sing paeans of praise to globalization in general, for such praise would fail to address – and would by many be taken to concede – the basic moral and political assertion inherent in the criticism – *viz.*, that globalization is harmful or even evil *because* it is accompanied by commercial exploitation *of the sort allegedly exemplified by Nike*. The California court's otherworldly observation that "*[n]o law required* Nike to combine factual representations about its own labor practices with expressions of opinion about economic globalization" (Pet. App. 26a (emphasis added)), offers scant comfort because, on any realistic assessment, Nike was obviously under every "*practical* compulsion" to do so (contra *id.* (emphasis added)). When even purely commercial speech is thus "inextricably intertwined" with noncommercial speech on matters of public concern, "the entirety" of the speech must "be classified as noncommercial." *Fox*, 492 U.S. at 474; see also, *e.g.*, *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

B. Because California's Legal Regime Will Predictably Chill Much Protected Speech, This Is An *A Fortiori* Case For The Application Of The "Actual Malice" Standard.

Measures that impose liability on or otherwise censure speech on matters of public concern – in contrast to statements of purely private interest and to the publication of traditional advertising – are subject to heightened standards of proof under the First Amendment. Compare *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (speech on matters of public importance) and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (matter of public importance but private-figure plaintiff) with *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (purely private matters). Those more stringent standards have not been reduced to the role of defenses to defamation suits alone, but apply to governmental action that, although formally restricting only falsehoods, creates a substantial prospect of chilling truthful expression.

E.g., *Time, Inc.* v. *Hill* (claim for depiction in heroic false light); *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968) (dismissal of public employee).

1. *Failure to Require Proof of Reckless Disregard for the Truth.* Wholly apart from the unique features of the UCL and FAL that profoundly inhibit protected speech discussed in Part II-A, *supra*, these causes of action violate the First Amendment because they would impose strict liability, or at least liability based on mere negligence, for misstatements on matters of public concern. California law thus eliminates the ability of any company whose voice reaches that State to speak on social issues with confidence that, if it is found in hindsight to have erred, it will be able to avoid liability upon proving that it made its best efforts to speak accurately. This Court, however, has rightly recognized that "erroneous statement is inevitable in free debate," and therefore "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive.'" *Sullivan*, 376 U.S. at 271-72. "[T]o insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968). Because even a negligence standard is "a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity," and thus creates an unacceptably great risk that truthful communication will be restrained for fear of liability, the First Amendment precludes the use of litigation to attack speech without having to prove clearly and convincingly that the speaker acted with at least reckless disregard for the truth (*Time, Inc.*, 385 U.S. at 389), a standard that California law does not impose and that Kasky does not contend he can satisfy.

2. *Failure to Limit Relief to Individuals Personally Pursuing the Prevention or Redress of Actual Injury.* The UCL and FAL conflict just as profoundly with the First Amendment for the independent reason that they empower

any citizen, acting in the self-assumed role of The (Private) Attorney General of California, to compel a speaker to defend against a lawsuit that would yield an order requiring the speaker to pay "restitution," to conduct a court-supervised campaign of "corrective speech," and broadly to desist from speaking in the future on important public issues in a manner that could be characterized as misleading, even if only by omission. Nor is it an answer that Kasky brings this action on behalf of other California consumers, for *they* need not have suffered any injury either. The California Supreme Court has deemed the UCL's statutory purpose to "deter" misstatements to be *so* important that courts may "order restitution without individualized proof of deception, reliance, and injury." *Bank of the West* v. *Superior Ct.*, 2 Cal. 4th 1254, 1267 (1992).

Every resident of California thus has the right to sue any corporation that happens to sell any product or service in that State to dispute the accuracy of any statement regarding that corporation's activities anywhere in the world. Kasky, for instance, alleges no injury and concedes he knows nothing about the facts but serves as plaintiff without bearing any costs under a standard contingent-fee arrangement with his lawyers. Provisions like these vastly increase the litigation exposure of any corporation or other entity that speaks (however indirectly) to California audiences and therefore create a marked inhibition to speech on matters of public concern.

A State's power to organize itself through whatever scheme of separation of powers it wishes (*Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 612 (1937) (per Cardozo, J.); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902)) does not confer the further authority to invest all of its citizens with a free-floating power to police speech in the name of the government. Cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963) (invalidating "informal censorship" by a roving commission). The First Amendment instead requires that the private plaintiff in such a suit be compelled to prove actual injury – *i.e.*, "evidence of actual loss" and "proof that such

harm actually occurred" – without which the governmental interest advanced by imposing liability is insufficiently weighty to risk chilling valuable expression. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

The entirely ethereal governmental interest supposedly furthered by the application of the UCL and FAL to statements of public importance – broadly ensuring that the public maintains an accurate sense of the speaker's moral worth (see *supra* Part I-B) – is no substitute for proof of actual harm as a method of taming the *in terrorem* effect of threatened litigation, and only a requirement of such proof can assure the offsetting existence of a truly significant governmental interest such as that in protecting the plaintiff's personal integrity and reputation. There is no such direct link between an injured party and the statements that the California Supreme Court held in this case could render a speaker liable – statements that affect consumer behavior only indirectly and for only a subset of listeners. [10]

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[10] Indeed, California's unfair trade practice and false advertising law is foreign to "the long accepted practices of the American people." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring). See Dee Pridgen, *Consumer Protection and the Law* 1-1 (2002) ("consumer protection law is actually a legal reform effort [repairing] traditional legal doctrine"). According to "state legislative practices prevalent at the time the First Amendment was adopted" (*44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring)), restrictions on trade practices applied only to market transactions of goods and services and imposed a very limited variety of penalties for non-compliance. See, *e.g.*, 1791 Ga. Laws No. 457 (regulation of tavern rates imposing forfeiture of excess profits plus two pounds for every offense); 1789 S.C. Acts No. 1574 (regulation of tobacco inspections imposing fines of 10 shillings per shilling of improper "fee, gift, or gratuity"); 1787 Mass. Acts M.10 (quantity and packing regulation of "the Assize of Barrel Beef and Pork" imposing penalties of forfeiture and pounds of "*three pounds*" per offense); 1787 N.C. Sess. Laws ch. X (tavern licensing regulation imposing fines of "fifty Pounds for every Offence"); II Del. Laws ch. CXXI.b. (1785) (zoning regulation of "public marts or fairs" imposing fines "of Ten Pounds" for "selling

Even if a trier of fact could determine what effect the hundreds of articles discussing labor conditions at Nike contract factories in Southeast Asia had on the consuming public, it is telling that California authorizes the conduct of litigation by, and the potential award of open-ended relief in the name of, a person who concedes that he was entirely unaffected by those statements and has no personal

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of strong liquors"); 1784 Conn. Acts (tavern licensing regulation imposing fines of 40 shillings per offense); 1783 N.J. Laws ch. CCCLXXXIII (licensing regulation for doctors imposing a fine of "*Twelve Pounds*" for unlicensed drug sales); 1783 Va. Acts ch. X (consolidating regulations of tobacco inspections imposing forfeiture of unlawful profits plus two shillings for every pound of tobacco unlawfully traded); 1781 Pa. Laws ch. CCI (stiffening bread inspection laws and imposing fines of "one shilling and six pence" for every non-compliant barrel of flour); 1780 Md. Laws ch. XXIV, § XI (trade regulation imposing fines of "hundred pounds of tobacco" for unlicensed liquor sales); 1780 N.Y. Laws ch. XLIII (price control regulation for various "domestic Produce" imposing treble fines per offense); Act for Regulating Taverns, &c. (1778), *reprinted in The First Laws of the State of New Hampshire* 142-44 (John D. Cushing ed., 1981) (quantity regulation of tavern liquor sales imposing fines "of *Ten Pounds*" per offense).

Nor did the landscape of consumer protection shift appreciably with "the state legislative practices at the time the Fourteenth Amendment was adopted" (*44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring)), a period in which the states generally relied on the common law doctrine of *caveat emptor*. See Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* 1 n.3 (5th ed. 2001) ("Notions of the sanctity of contracts and *caveat emptor* • • • only reached full development in the 19th century"); Morton J. Horwitz, *The Historical Foundation of Modern Contract Law*, 87 Harv. L. Rev. 917, 945 (1974) (noting the "rapid adoption of the doctrine" in America beginning in 1804). Indeed, the first state consumer protection statute did not even appear until 1921, joined by just one more before 1960. See Pridgen, *supra*, at App. 3A-2 (indicating the dates of enactment for all state consumer protection statutes). The first form of American advertising regulation likewise did not appear until 1872, four years after ratification of the Fourteenth Amendment. Dean K. Fueroghne, *Law & Advertising* 2 (1995).

knowledge of their truth. A legal scheme permitting bystanders to sue or not as they see fit cannot be assumed to directly advance an important governmental interest. Any suggestion that suits pursued by these optional private attorney generals without any allegation of injury advance an established and important governmental interest is belied both by the fact that no other state or the federal government has adopted a remotely similar legal regime (see generally Cert. *Amicus* Br. of Cal. Civil J. Ass'n & App.) and by the state's evident willingness to allow all of the speech at issue, even if false, to go unredressed should no citizen choose to pursue the matter on the public's supposed behalf.[11]

The private attorney general provisions of the UCL and FAL thus violate the First Amendment because they omit not only any requirement that the plaintiff have suffered harm, but also any *other* meaningful constraint on the ability of private plaintiffs to bring lawsuits that have the potential to impose crushing financial costs upon the defendant-speaker, whether through an order of restitution or through the "burden and expense of litigating" a meritless or marginal claim – which can, without more, "unduly impinge on the exercise of the constitutional right" of free speech, ultimately making the dissemination of truthful information "the loser." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 n.21 (1978) (citation and alteration omitted).

There is a significant First Amendment distinction between private suits under the UCL and FAL and superficially similar actions brought by the government. When a regulatory agency is charged with administering a statutory scheme under political and budgetary constraints, there is at least some prospect that enforcement will be

[11] Even on the most expansive view of a private attorney general's ability to secure prospective relief absent proof of personal harm, Kasky's suit must fail. Respondent does not contend that any of the statements at issue in this case are now, or were at the time he filed suit, being published on an ongoing basis.

restrained by the agency's obligation to advance a coherent regulatory mission and to respect the constitutional rights of the regulated parties.[12] To be sure, even if it is "the government [that] intervenes to prevent speech on the basis that it is false, without more, there are reasons to fear that the government acts out of bias or in an effort to repress minorities." Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 N.W. U. L. Rev. 1212, 1262 (1984). But the prospect of such ideologically driven stifling of speech is enhanced immeasurably when private parties who have suffered no provable injury are invested with the roving power to bring suits challenging speech on matters of public concern. Cf. *Terminiello* v. *Chicago*, 337 U.S. 1, 3 (1949) (law void on its face if it punishes speech that "stirs the public to anger [or] invites dispute"); Zachariah Chaffe, *Free Speech in the United States* 245 (1948) (government must protect speakers from hostile audience reaction).

There is therefore an irreconcilable conflict between (a) a statutory regime that seeks to *prophylactically prohibit* supposed misstatements on matters of public concern in order to protect consumers by vesting broad authority to bring suits in every state citizen who is motivated to assume the mantle of private attorney general, and (b) the settled body of First Amendment law that *prophylactically protects* the very same misstatements in order to ensure that protected speech is not inhibited by fear of just such lawsuits. The Constitution cannot countenance giving a judge or any other official of

[12] Entirely separate issues would therefore be presented by a legal regime empowering a publicly accountable government agency to determine that a particular false statement would threaten harm to the persons it would deceive and should therefore be restrained by a suitably narrow order upon proof of falsity and likely harm. *E.g.*, *Nat'l Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157 (CA7 1977). The *Kasky* scheme embodied in the UCL and FAL bears no resemblance to such a regime.

government a free-standing power to rule as Grand Arbiter of Truth, a power readily distinguishable from that of adjudicating truth or falsity when demonstrably necessary to prevent a palpable personal injury such as fraud or defamation. For law is a great teacher, and the lesson taught by the state's gratuitous assumption of that awesome power must be how superfluous it is for individuals to participate vigorously in public debate and to evaluate for themselves the statements of others: the promise that an *official* truth may be obtained through citizen-initiated litigation threatens to reduce the informal process of public controversy that the First Amendment thus far has been understood to embrace at its core to little more than a dress rehearsal.

Perversely, the discovery of truth will be the loser. For the "best test of truth is the power of the thought to get itself accepted in the competition of the market * * *." *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 534 (1980) (quoting *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). That is why a core "purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion." *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))). In the classic words of Judge Learned Hand (*United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)), the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be reversed.

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Supreme Court, U.S.
FILED
APR 4 - 2003
OFFICE OF THE CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), and under the fourth exception to the final-judgment rule specified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

2. Petitioner Nike, Inc., and the United States, as amicus curiae, seek reversal based on an argument that Nike did not raise below and that the California Supreme Court did not address. The question is whether Nike and the United States can rely on this argument as a ground for reversal and, if so, whether the First Amendment prohibits California from authorizing its citizens to sue on behalf of the general public under laws regulating false or misleading commercial messages.

3. Whether Nike's factual representations about the conditions under which its products are made, as alleged in the complaint, are commercial speech subject to laws regulating false or misleading commercial messages.

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JURISDICTION

The Court does not have jurisdiction. See *infra* at 14-18.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations are printed in the appendix to this brief: 15 U.S.C. §§ 45(a)(1), 1125(a); 16 U.S.C. § 1385; 18 U.S.C. § 1159(a); Cal. Bus. & Prof. Code §§ 17200-09, 17500, 17506, 17506.5, 17522, 17533.7, 17534-36.5, 17569, 17580.5; Cal. Civ. Code § 1770(a)(4); Cal. Civ. Pro. Code §§ 128.7, 425.16, 452, 472, 472c(a), 1021.5; Cal. Lab. Code § 1012; 16 C.F.R. Pt. 260 (cited as "App. __a").

STATEMENT OF THE CASE

Respondent Marc Kasky filed this suit against petitioner Nike, Inc. in San Francisco Superior Court on April 20, 1998. He subsequently filed an amended complaint as a matter of right. Cal. Civ. Pro. Code § 472 (App. 52a). This complaint is the entire record of factual allegations before the Court.

1. The complaint alleges that Nike, for the purpose of inducing consumers to buy its products, made false representations of fact about the conditions under which they are made.

This case is here on Nike's demurrer to the complaint. Basic pleading rules govern at this stage, with important consequences.

First, under California law, on demurrer the complaint's allegations must be taken as true. Pet. App. 2a. The Court must therefore disregard the factual assertions in the "Introduction" and elsewhere in Nike's brief that are unsupported by citations to the complaint.

Second, the complaint's allegations are based on respondent's "information and belief." Cmplt. ¶ 3. Contrary to Petr. Brief 5, 20, 28, 45, 47-48, pleading on information and belief is not a suspect device: "[T]he value of averments on information and belief in the procedure of the law is

recognized." *Berger v. United States*, 255 U.S. 22, 34 (1921); *see, e.g., People v. McKale*, 602 P.2d 731, 735 n.2 (Cal. 1979).

Third, in determining the sufficiency of a complaint, "its allegations must be liberally construed." Cal. Civ. Pro. Code § 452 (App. 52a); *see, e.g., Hudson v. Craft*, 204 P.2d 1, 5 (Cal. 1949). The law thus "commands us to construe the allegations of a complaint *liberally in favor of the pleader*." *Skopp v. Weaver*, 546 P.2d 307, 311 (Cal. 1976) (emphasis added). Nike's recitation of the complaint's allegations conflicts with this basic rule. Nike begins by attributing a "consistent pattern" to the complaint that misdescribes it in Nike's favor. Petr. Brief 6. Nike then treats the complaint, which by law must be liberally construed, as if it were a complete statement of the evidence that respondent will introduce to prove Nike's false representations at trial. *Id.* 7-11.

Fourth, in opposing Nike's demurrer, respondent has from the very outset relied on the same six false claims in the same nine Nike communications. See Cal. S. Ct. Open. Brief 3-6; Reply Brief 2-3. Yet, as will be noted, in reciting the allegations Nike omits false statements that respondent relies on and adds other statements that he does not rely on.[1]

Respondent will therefore set forth the complaint's material factual allegations, which by law must be used to determine its sufficiency against a demurrer.

Nike is in the business of manufacturing, distributing, marketing, and selling consumer goods in the form of athletic footwear and apparel. Cmplt. ¶¶ 5, 7, 13-17. In 1997, Nike spent almost $1 billion "to promote, advertise and market" its products. *Id.* ¶ 13.

---

[1] The complaint includes a seventh false claim relating to the Good-Works report. Cmplt. ¶¶ 1(f), 56-57, 61. Respondent has never relied on this claim in opposing Nike's demurrer. See Cal. S. Ct. Reply Brief 3. Nike knows this, but nevertheless asserts that respondent is relying on this claim. See Petr. Brief 11-12.

Nike manufactures almost all its athletic shoes in subcontracted factories in China, Vietnam, and Indonesia. The majority of the workers in these facilities are women under the age of 24. *Id.* ¶¶ 21, 40. Since 1993, under a memorandum of understanding between Nike and each of its subcontractors, Nike has assumed responsibility for their compliance with applicable local regulations governing minimum wages and overtime, occupational health and safety, and environmental protection. *Id.* ¶¶ 22-26.

In the mid-1990's, the complaint alleges, studies and reports issued by human-rights groups and other organizations brought to public attention the actual production practices and working conditions in the factories making Nike's shoes. One of the main sources of information about these conditions was an internal audit report prepared for Nike by Ernst & Young, "Report on Environmental and Labor Practice Audit," which Nike was able to keep secret for ten months before it was leaked to the public. *Id.* ¶¶ 18, 34-35, 41-43, 47, Ex. B. Other sources of information included the television news program, CBS News Report, "48 Hours," *id.* ¶ 29, Ex. F; a report by Vietnam Labor Watch, *id.* ¶¶ 18, 29, 36-37, 49, 53, Exs. E, BB; a study by Hong Kong Christian Industrial Committee and Asia Monitor Resource Center Ltd., "Working Conditions in the Sports Shoe Industry in China," *id.* ¶¶ 18, 32, 33, Ex. C; and "Briefing Paper: Sweating for Nike," published by Community Aid Abroad, *id.* ¶ 29, Ex. X.

The studies and reports referenced in the complaint documented, among other things, that workers in Nike's production facilities were forced to work overtime, often without overtime pay, and to work excessive overtime, in violation of local laws, *id.* ¶¶ 31-37; were in some cases paid less than the applicable minimum wage, *id.* ¶¶ 48-50; were subjected to physical punishment and abuse, *id.* ¶ 29; and were exposed to reproductive toxins and other harmful chemicals in the solvents and glue used in the production of Nike's shoes, as well as excessive heat, dust, and noise, without adequate safety

equipment, in violation of local laws, *id.* ¶¶ 40-43. For example, the internal audit that Ernst & Young conducted for Nike found that, in 96% of the cases examined, workers in one of the factories "were required to work above the maximum working hours." *Id.* ¶¶ 34-35, Ex. B. In that factory, which employed almost 10,000 workers, the Ernst & Young audit also found that the level of toluene, a reproductive toxin, "exceeded the standard from six to 177 times"; that the level of acetone, another toxic chemical, "exceeded the standard from six to 18 times"; and that dust "exceeded the standard by 11 times." *Id.* ¶¶ 42-43, Ex. B.

The complaint alleges that, in response to the public disclosure of these conditions and practices, Nike made false factual representations to California consumers about the production of its goods. *Id.* ¶ 18.

The United States, as amicus curiae, refers generically to these representations as being concerned with "the production of the goods that the company sells"; "Nike's means of production"; "the means used to produce goods"; "production practices"; and "the working conditions in its production facilities." U.S. Brief (I), 27-29. Respondent will use these and similar generic phrases, such as "the circumstances under which Nike's goods are produced" and "the conditions under which its products are made."

Specifically, the complaint alleges that Nike made six false representations:

- that its products are manufactured in compliance with applicable local laws and regulations governing wages and working hours, ¶¶ 1(b), 25, 30-38, Exs. D, R, Z. (Nike omits Exs. D and Z, while adding a statement in Ex. Q, which is not alleged to be false. Petr. Brief 9.);
- that the average line-workers in the factories are paid double the applicable local minimum wage, ¶¶ 1(d), 46-51, Exs. P, V, Z, DD. (Nike mentions this claim, but then says nothing about it. Petr. Brief 10-11.);

- that the workers receive free meals and health care, ¶¶ 1(e), 52-53, Exs. P, V, Z, DD. (Nike omits Exs. P and V and misrepresents ¶ 53 by describing and quoting from the wrong exhibit. Petr. Brief 11.);
- that Nike "guarantee[s] a living wage for all workers," ¶¶ 1(g), 18, 62-64, Ex. II;
- that the workers are protected from corporal punishment and abuse, ¶¶ 1(a), 28-29, Exs. D, U, V. (Nike omits Ex. D, while adding a statement in Ex. T, which is not alleged to be false. Petr. Brief 8.);
- that working conditions in the factories are in compliance with applicable local laws and regulations governing occupational health-and-safety and environmental standards, *id.* ¶¶ 1(c), 25, 39-45, Exs. Q, R, V, Z. (Nike omits Exs. Q, V, and Z, while adding a statement in ¶ 39, which is not relied on, and a statement in ¶ 44, which is not alleged to be false. Petr. Brief 9-10.).

The complaint alleges that Nike made these false representations in "its advertising, promotional campaigns, public statements and marketing." *Id.* ¶¶ 75, 79, 82(b), 84. The complaint identifies nine Nike communications in which the false representations appeared: a two-page letter with Nike's logo from Nike's Director of Sports Marketing to university presidents and directors of athletics, *id.*, Ex. R; a 33-page illustrated pamphlet, entitled "Nike Production Primer," *id.*, Ex. V; a posting with Nike's logo on Nike's Web site, *id.*, Ex. U; a posting of a press release with Nike's logo on Nike's Web site, *id.*, Ex. II; a three-page document on Nike's letterhead with Nike's logo, *id.*, Ex. P; a press release with Nike's logo, *id.*, Ex. Z; a five-page letter with Nike's logo from Nike's Director of Labor Practices to the Chief Executive Officer, YWCA of America, *id.*, Ex. D; a two-page letter with Nike's logo from Nike's PR Manager, Europe, to International Restructuring Education Network Europe, *id.*, Ex. Q; a letter to the editor of *The New York Times* from Nike's Chairman and Chief Executive Officer, *id.*, Ex. DD.

These communications promoted Nike and the goods it sells by extolling its production practices.

The complaint further alleges that Nike made the false representations "with intent to induce members of the public" to buy its products and "in order to maintain and/or increase its sales and profits." *Id.* ¶¶ 1, 75, 79, 82, 84. In particular, Nike sought to appeal to "consumers who do not want to purchase products made in sweatshop and/or under unsafe and/or inhumane conditions." *Id.* ¶ 27. Nike expressed this purpose in a letter to a leading California newspaper:

> "We'd like *consumers* to know that Nike has helped create 500,000 good-paying jobs all over the world. . . . .
>
> "During the [Christmas] shopping season, *we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions.*"

Id. ¶ 27, Ex. S (emphasis added). In sum, the complaint alleges that, in making the false representations about the conditions under which its products are made, Nike's purpose was to induce consumers to buy its products.

2. The complaint alleges that Nike's representations violated California laws regulating false or misleading commercial messages.

The complaint alleges that, by making the false representations set forth above, Nike violated California laws regulating unfair competition and false advertising. Cal. Bus. & Prof. Code §§ 17200 *et seq.*, 17500 *et seq.*

Originally enacted in 1933, California's unfair-competition law is often referred to as "one of the so-called 'little FTC Acts.'" *Rubin v. Green*, 847 P.2d 1044, 1052 (Cal. 1993). Section 5 of the Federal Trade Commission Act (FTC Act) prohibits "[u]nfair methods of competition" and "unfair or

deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (App. 1a). Similarly, the California law defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200 (App. 30a). As the California Supreme Court explained in the decision below, the purpose of the unfair-competition law "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." Pet. App. 5a. Because of "the similarity of language and obvious identity of purpose" of California's unfair-competition law and the "parallel" § 5 of the FTC Act, the California courts consider that "decisions of the federal court on the subject are more than ordinarily persuasive." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 543 (Cal. 1999) (internal quotation marks omitted).

Originally enacted in 1915, the false-advertising law "is the major California legislation designed to protect consumers from false or deceptive advertising." *People v. Superior Court (Olson)*, 157 Cal. Rptr. 628, 634 (Cal. Ct. App. 1979). The law derives from "the so-called 'Printers' Ink Model Statute' drafted in 1911 at the behest of the advertising journal of the same name." *Id.* The model statute "made it a misdemeanor to place before the public any advertisement containing 'any assertion, representation or statement of fact which is untrue, deceptive or misleading.'" *Id.* More than 40 other states and the District of Columbia have also adopted statutes based on this model. *Id.* at 634 n.7. Unlike the strict-liability model statute, the California law requires negligence. *Id.* at 635-37. It forbids anyone, with intent to dispose of property, to disseminate any "statement" concerning the property "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500

(App. 38a). A violation of the false-advertising law is also a violation of the unfair-competition law. Pet. App. 7a.

Under both California laws, to state a claim "based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived." Pet. App. 7a (internal quotation marks omitted); *see Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Cal. Ct. App. 2003) ("'Likely to deceive' . . . indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled."). This standard of deception is essentially the same as the standard applied by the Federal Trade Commission (FTC) in enforcing § 5. As the FTC explained in its Deception Policy Statement: "[T]he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably under the circumstances, to the consumer's detriment." Letter from the FTC to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (Oct. 14, 1983), in *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 app. at 176 (1984). California has no administrative agency equivalent to the FTC. But "California courts remain the ultimate arbiters of the meaning and scope of the unfair competition law, just as the federal courts are the ultimate arbiters of the meaning and scope of section 5 and the FTC's authority under it." *Cel-Tech*, 973 P.2d at 543; *see FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("[I]n the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction.").

But "[w]hile the scope of conduct covered by the [unfair-competition law] is broad, its remedies are limited." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003). The unfair-competition and false-advertising laws do not permit the recovery of damages, either compensatory or punitive. *Cel-Tech*, 973 P.2d at 539. The laws do provide for

civil penalties, but only in cases brought by public prosecutors. Cal. Bus. & Prof. Code §§ 17206, 17206.1, 17536 (App. 32a, 34a, 43a). Private plaintiffs, therefore, have only two potential remedies. First, the trial court may order injunctive relief that it finds to be "necessary" to prevent the unlawful practices. *Id.* §§ 17203, 17535 (App. 31a, 41a). Second, the court may order restitution by compelling the "defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken." *Kraus v. Trinity Management Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000); *see Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 715 n.10 (Cal. 2000) (noting that "restitutionary remedies" of §§ 17203 and 17535 "are identical and are construed in the same manner"). Thus, the laws provide "an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices." *Korea Supply*, 29 Cal.4th at 1150.

Since the filing of this case, the California Supreme Court has significantly limited the defendant's financial exposure in cases brought by private plaintiffs. The court has made clear that restitutionary relief "is limited to restoring money or property to *direct victims* of an unfair practice." *Id.* at 1151 (emphasis added). Thus, the court has held that "nonrestitutionary disgorgement of profits is not an available remedy in an individual action." *Id.* Similarly, the court has held that "disgorgement into a fluid recovery fund is not a remedy available" in individual actions that are not certified as class actions. *Kraus*, 999 P.2d at 721, 732. And because the law "does not mandate restitutionary or injunctive relief when an unfair business practice has been shown," the court has held that the defendant is entitled to assert "equitable considerations": "In deciding whether to grant the remedy or remedies sought by [the] plaintiff, the court must permit the defendant to offer such considerations." *Cortez*, 999 P.2d at 717. In

short, the court has maintained "the balance struck in this state's unfair competition law between broad liability and limited relief." *Korea Supply*, 29 Cal.4th at 1152.

Actions may be brought under these laws "by any person acting for the interests of itself, its members or the general public." Cal. Bus. & Prof. Code §§ 17204, 17535 (App. 31a, 41a). As authorized by this provision, respondent brought this suit "on behalf of the General Public of the State of California." Cmplt. ¶¶ 3, 8. Because the "action is equitable in nature," *Korea Supply*, 29 Cal.4th at 1144, the trial will be held without a jury, *see, e.g., C&K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1139-41 (Cal. 1978). Thus, the trial judge will determine whether the allegations are proven and, if so, whether Nike's false representations meet the legal standard of being "likely to deceive" the public.

The complaint seeks injunctive relief and an order that Nike "disgorge all monies" acquired by means of its unfair business practices. Cmplt. at 34. As noted, however, the court cannot order nonrestitutionary disgorgement, as requested by respondent, because that is no longer an available remedy for a private plaintiff. Moreover, at this stage of the case, it is impossible to predict what remedy might be appropriate after trial. Nike, for example, might present "equitable considerations" that persuade the court not to grant any relief at all.

3. The only result of the proceedings so far is the overruling of Nike's demurrer to the complaint.

Nike demurred to the complaint on several grounds, including a defense based on the First Amendment. Nike's Dem. ¶ 3. The Superior Court sustained the demurrer and dismissed the case. Pet. App. 80a-81a. Respondent appealed rather than requesting leave to amend. *See* Cal. Civ. Pro. Code § 472c(a) (App. 52a). The California Court of Appeal affirmed the dismissal in an opinion that has been vacated. Pet. App. 66a; see Cert. Opp. 1.

The California Supreme Court reversed, concluding that Nike's false representations, as alleged in the complaint, "are commercial speech for purposes of applying state laws barring false and misleading commercial messages." Pet. App. 1a-2a. The court summarized the basis of its conclusion as follows: "the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products." *Id.* 1a. The court remanded for further proceedings, noting that it had not decided whether the "complaint is vulnerable to demurrer for reasons not considered here." *Id.* 30a.

SUMMARY OF ARGUMENT

I. The Court has no jurisdiction in this case for two distinct reasons. First, Nike has failed to establish its standing to seek review under *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989). No judgment of any kind has been entered against Nike, and *ASARCO* does not authorize review for every defendant who loses in an interlocutory appellate decision.

Second, Nike has failed to show that this case is within the fourth exception to the final-judgment rule specified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Nike has neither shown that reversal would necessarily preclude further litigation nor that the decision below has an impermissible chilling effect on protected speech.

II. Nike and the United States seek reversal based on the argument that the First Amendment prohibits California from authorizing its citizens to sue on behalf of the general public under laws regulating false or misleading commercial messages. This argument was neither pressed nor passed upon below, and therefore the Court should refuse to consider it.

In addition, the argument fails because Nike and the United States ignore important safeguards and protections embodied in California law. First, uninjured private plaintiffs have no financial incentive for bringing suit because these

laws do not provide for damages, and thus successful plaintiffs receive no monetary recovery. In addition, the defendant's financial exposure is limited because there can be no disgorgement of profits and no disgorgement into a fluid recovery fund. The only possible monetary remedy, restitution, is limited to direct victims of the unfair practice.

Other safeguards include the requirement that the action confer "a significant benefit" on the public as a condition of an award of attorney's fees; the right of a defendant with a First Amendment defense to file a "SLAPP" motion at the outset of the case, which will result in its dismissal unless the plaintiff establishes a "probability of prevailing" on the claim; the burden on the plaintiff to prove the case in a non-jury trial and then to establish that relief, which is not mandatory, should be granted; and the defendant's right to offer "equitable considerations" against granting the relief sought.

Nike and the United States also fail to show that the private-plaintiff provision has an impermissible chilling effect.

III. The complaint alleges that Nike's representations violated California laws regulating false or misleading comercial messages. The First Amendment permits the regulation of false or misleading commercial speech, and Nike's representations, alleged in the complaint to be false, are commercial speech. Hence, they are subject to regulation under these laws.

Nike's representations are commercial speech because, as alleged in the complaint, they gave consumers factual information to rely on in deciding whether to buy Nike's products. Many consumers do not want to buy goods made under illegal, unsafe, or inhumane conditions. Nike's representations assured these consumers that its goods are not made under such conditions. Companies make similar representations about the circumstances under which their goods are

produced in many familiar cases of commercial speech: they claim that their products are made in the United States or by union labor, that their tuna is "dolphin safe," and that their goods have been produced in ways that do not harm the environment. Consumers rely on this information in their purchasing decisions, and these claims are therefore subject to regulation if false. The United States makes this point forcefully. See U.S. Brief 28.

Nike sought to appeal to consumers who would believe its representations about the conditions under which its products are made and therefore buy them. With the purpose of inducing purchases by these consumers, Nike conveyed this information in prepared public statements and postings on its Web site. At the same time, these corporate communications told consumers that Nike knew the facts about the conditions and practices in its production facilities. These allegations are sufficient to meet the Court's tests for identifying commercial speech.

Nike's representations have no immunity from laws regulating false or misleading commercial messages. It is not enough that they addressed matters of "public importance." Petr. Brief 21-36. Such matters—in this case, the conditions in Nike's production facilities—are often the subject of commercial speech. Nor were these representations part of a broader debate about more general public matters. Nike implies that they were throughout its brief, but the complaint's allegations do not show any such broader debate. Nor were the representations direct comments on public issues. They were concerned only with the production of Nike's own goods.

Nike argues that its representations are not commercial speech because they were responses to others' allegations. *Id.* 28. According to this argument, companies responding to public allegations about their goods are immune from regulation under § 5 of the FTC Act and comparable state laws. This argument conflicts with an important precedent

upholding the FTC's enforcement authority, *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977). In addition, the argument arbitrarily disregards the interest of consumers in receiving truthful commercial information and fails to take into account the company's access to the facts about its own product. Moreover, companies have the ability to sue noncommercial speakers for product disparagement for making false statements about their products.

ARGUMENT

I. The Court has no jurisdiction in this case.

1. Respondent argued that the Court has no jurisdiction under *ASARCO* in Cert. Opp. 6-10. Having declined to confront the issue in its petition for certiorari, Nike replied to respondent's argument in Cert. Reply 1-3.

In *ASARCO*, the Arizona Supreme Court had remanded the case "with instructions to *enter summary judgment* for respondents." As this Court also phrased it, the Arizona Supreme Court had "*granted* plaintiffs *a declaratory judgment*." 490 U.S. at 610, 611 (emphasis added). In this procedural posture, this Court stated the question as "whether we may examine justiciability at this stage because the Arizona courts *heard the case* and *proceeded to judgment*." *Id.* at 612 (emphasis added). After concluding that the plaintiffs lacked federal standing, the Court explained that the Arizona courts had "let[] the case *go to final judgment*" and that the question was therefore "whether *a judgment rendered* by the state courts in these circumstances can support jurisdiction in this Court." *Id.* at 617 (emphasis added). The Court also noted that the state proceedings had "resulted in *a final judgment altering tangible legal rights*." *Id.* at 619 (emphasis added).

Respondent therefore argued in this case that, since no judgment of any kind, final or otherwise, had been entered against Nike, it could not seek review under *ASARCO*. See

Cert. Opp. 8-10. According to Nike, however, the California Supreme Court's decision "produce[d] a 'judgment' against Nike" just as the Arizona Supreme Court's decision "produced a 'judgment' against the private lessees." Cert. Reply 3 n.2. But that is so only in the limited sense that *any* appellate decision is the appellate court's "judgment." The reality is that the California Supreme Court only overruled Nike's demurrer to the complaint, sending the case back for possible further demurrer proceedings, followed by litigation and trial. Pet. App. 30a. In *ASARCO*, by contrast, the Arizona Supreme Court instructed the trial court to "*enter summary judgment*" against the lessees, and this Court was careful to specify that the state courts had "*proceeded to* judgment" and reached a "*final* judgment." This Court could not have been contemplating that it was authorizing review in these cases for every defendant who is the losing party in an interlocutory appellate decision.

Even assuming that *ASARCO* does not require the entry of a judgment of some kind against the petitioner, Nike fails to show that it meets Article III's injury requirement:

- Nike asserts that it "face[s] the prospect that an award will be entered against [it] in this case" and that there is a "distinct and present threat that such relief will be granted on remand." Cert. Reply 2, 3. But Nike is in the same position as any other defendant whose demurrer has been overruled: Nike must now proceed to the next stage of the litigation process.

- Nike asserts that it is "required to litigate the constitutionality of the state statutes' restriction on [its] speech." *Id.* 3. Again, Nike is in the same position as any other defendant with a federal defense.

- Nike asserts that it "labor[s] under the 'defined and specific legal obligation' . . . to conform [its] speech to the California Supreme Court's definitive construction of that state's statutes and its narrow reading of the First Amendment." *Id.* 2. In *ASARCO*, however, the quoted phrase referred to the

"definite shape" that "the case" had taken on "as a result of the state-court judgment." 490 U.S. at 618. But Nike's obligation "to conform [its] speech" to the court's decision is the same as anyone else's obligation and, indeed, is the same as it would be if the court had issued its decision not in this case, but in some earlier case.

• Nike asserts that its demurrer is "functionally indistinguishable from a request for a declaratory judgment" that the statutes are unconstitutional. Cert. Reply 3. By this argument, as soon as a defendant asserts a federal defense—by demurrer, answer, counterclaim, or otherwise—the defendant has Article III standing. If so, the *ASARCO* lessees had Article III standing as soon as they intervened to defend the state statute under federal law. 490 U.S. at 610.

2. Respondent argued that the Court has no jurisdiction under the final-judgment rule in Cert. Opp. 11-17. Nike replied by relying solely on "the so-called 'fourth *Cox* category.'" Cert. Reply 4. This exception has two requisite conditions, neither of which is met here.

To meet the first condition, Nike must show that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Cox*, 420 U.S. at 482-83; see Cert. Opp. 13-14 (citing cases). But reversal on one of the grounds Nike has urged would not terminate the litigation, because the California courts would allow respondent to amend his complaint.

One of Nike's contentions in this Court is that California law unconstitutionally imposes "[l]iability . . . without fault." Petr. Brief 20.[2] Nike did not make this contention below. Justice Brown, dissenting, suggested that the states could be

[2] Nike asserts that "liability attaches notwithstanding the speaker's best efforts to ensure the statements' accuracy"; that the law eliminates "any defense of good faith"; that "*no* degree of effort suffices to protect the speaker from the strict liability of California law"; and that the law imposes "*post hoc* strict liability." Petr. Brief 3, 20, 40, 41.

given "the flexibility to define the standard of liability for false or misleading representations in this context so long as the standard is not strict liability." Pet. App. 63a. If the Court reverses on this ground, respondent will file an amended complaint alleging that Nike negligently made each of the false representations at issue. Litigation will then continue on the same causes of action. See Cert. Opp. 14-15.

Nike replied that this reversal "would require dismissal of [the] complaint as pleaded." Cert. Reply 4. But the point is that it would not be "*preclusive of any further litigation* on the relevant cause of action." *Cox*, 420 U.S. at 482-83 (emphasis added). Nike also replied that this is only "the mere possibility that the complaint hypothetically could be amended to add allegations" to meet the Court's ruling. Cert. Reply 4. But it will be a simple matter for respondent to amend the complaint to allege, in addition to the allegations of negligence set forth in Cmplt. ¶¶ 30, 76, that Nike negligently made each of its false representations. Nike also replied that *Cox* does not require that reversal "negate every imaginable theory of liability." Cert. Reply 4-5. But Nike's own "imaginable theory" is the basis of this reversal, and, contrary to Nike's implication, it would *not* "dispose of 'the relevant cause of action.'" *Id.* 5. Finally, Nike replied that respondent "admitted below" that Nike's "'statements are immune from state regulation'" if they are not "'commercial speech.'" *Id.* But this reversal would mean that Nike's false representations *are* commercial speech.

In addition, in opposing Nike's demurrer, respondent has relied on six false representations in nine separate communications. See *supra* at 4-5. Nike has failed to show that the Court could not reverse on fewer than all of these representations. In that event, this litigation would continue on the others. Again, therefore, Nike has not shown that reversal would necessarily end this case.

To meet the second condition, Nike must show that "a refusal immediately to review the state-court decision might

seriously erode federal policy." *Cox*, 420 U.S. at 483; see Cert. Opp. 15-17. Nike argues that the decision below has an impermissible chilling effect on protected speech. See Cert. Reply 5-7; Petr. Brief 38-43. But Nike ignores important safeguards and protections embodied in California law and fails to show any such chilling effect. See *infra* at 20-26.

II. The First Amendment does not prohibit California from authorizing its citizens to sue on behalf of the general public under laws regulating false or misleading commercial messages.

The United States argues that the First Amendment does not "allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements." U.S. Brief 8. Nike similarly argues that "the legal regime approved by the California Supreme Court violates the First Amendment" because it does not "limit relief to individuals personally pursuing the prevention or redress of actual injury." Petr. Brief 19-20, 44 (heading).

This argument was neither pressed nor passed upon below. In addition, the argument fails because Nike and the United States ignore important safeguards and protections embodied in California law and do not show that the private-plaintiff provision has an impermissible chilling effect.

A. Because their argument was neither pressed nor passed upon below, Nike and the United States cannot rely on it as a ground for reversal.

Nike did not raise this argument in the California Supreme Court, and that court did not address it. *See, e.g., Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). This Court recently emphasized in a federal case that, in contrast to a respondent who is defending a judgment, "it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments

were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). Accordingly, the Court should refuse to consider this new argument.

The United States suggests that the question is embraced within Question 2 of the petition for certiorari. U.S. Brief (I). If so, it is only because Question 2 is vague enough to embrace any question that mentions the First Amendment and relates to "the legal regime approved" below. It is notable that the petition did not make this argument in support of Question 2. See Cert. Pet. 19-23. Nike did contend that the decision below "chills protected speech . . . in a manner and to a degree *that requires this Court's immediate review*." *Id.* 23-30 (quoting heading, *id.* 23; emphasis added); see Cert. Reply 6-7. But that contention concerned the final-judgment rule.

In any event, the fact is that Nike failed to raise this argument below. This failure deprived the California Supreme Court, the California Attorney General, and respondent "of the ability to address significant matters" in response to the argument. *United States v. United Foods*, 533 U. S. at 416-17.

The provision of the unfair-competition law that authorizes suits by private plaintiffs on behalf of the general public has been part of the law since it was first enacted in 1933. *See Kraus*, 999 P.2d at 727. The Legislature has amended the law a number of times in the past 70 years, but has left this provision intact. *See* Deering's California Codes, Civil Code Annotated §§ 3369-70.2 (1984); Deering's California Codes, Business and Professions Code Annotated §§ 17200-09, 17500, 17534-36.5 (1992 & Supp. 2002); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1096-97 (Cal. 1998). Had Nike raised this argument below, the California Attorney General would have had the opportunity to defend the constitutionality of this provision. The Attorney General filed an amicus brief supporting respondent below and could

have developed a record showing that these private suits assist law enforcement in combating consumer fraud.[3] And respondent would have had the opportunity to document the unsuccessful attempts by the law's opponents to persuade the Legislature to eliminate this provision.

The California Supreme Court would also have had the opportunity to address the issue. At the very least, the court could have elaborated on its view that these private actions, along with consumer class actions, "serve important roles in the enforcement of consumers' rights." *Kraus*, 999 P.2d at 724-25. In particular, they "supplement the efforts of law enforcement and regulatory agencies," and the court has therefore "repeatedly recognized the importance of these private enforcement actions." *Id.* at 725.

B. Nike and the United States ignore important safeguards and protections embodied in California law and fail to show that the provision for private-plaintiff suits has an impermissible chilling effect.

1. California law embodies important safeguards and protections for defendants in these private-plaintiff actions. First and foremost, private plaintiffs who have not suffered an injury have no financial incentive for bringing suit. As explained *supra* at 8, the unfair-competition and false-advertising laws do not permit the recovery of damages. Thus, successful plaintiffs receive no recovery for themselves, and they receive no "bounty" from any other recovery, as they do, for example, under the federal False Claims Act. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771-72 (2000).

[3] For an example of such a private suit, see *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73 (Cal. 1994), where the court unanimously held that California could exercise its police power to protect minors from an advertising campaign for Camel cigarettes featuring the cartoon character "Old Joe Camel."

Moreover, in cases brought by private plaintiffs under these laws, the defendant's financial exposure is limited. Not only can there be no recovery of damages, there can be no disgorgement of profits and no use of the class-action remedy of disgorgement into a fluid recovery fund. See *supra* at 9. Thus, in these cases, the *only* available monetary remedy is restitution, which is limited to "*[a]ctual direct victims* of unfair competition." *Korea Supply*, 29 Cal.4th at 1152 (emphasis added). This means that, when a trial court awards restitution, it must use a claims procedure that requires "notify[ing] the absent persons on whose behalf the action is prosecuted of their right to make a claim for restitution." *Kraus*, 999 P.2d at 732 n.18. Hence, in a case like this one, restitution is limited to those identified claimants who relied on the defendant's false representations in buying its product and who make individual claims for refunds.

The United States' view of California law thus rests on serious misconceptions. It is not true that the law allows "private parties to obtain substantial monetary awards," so that private lawsuits may be motivated "by the prospect of financial gain." U.S. Brief 22-23. Nor is it true that "the scope of restitutionary relief . . . provides potentially enormous awards to entrepreneurial plaintiffs." *Id.* 23. As just explained, uninjured private plaintiffs can recover *nothing*.

The United States also suggests that "[t]he potential for massive monetary liability" may deter the speech even of "a company of Nike's size." *Id.* at 25.[4] This suggestion seems to be based on the mistaken view that defendants in private-

[4] Nike refers to "potentially crushing relief," "devastating financial sanctions," "potentially crushing suits," a "potentially staggering amount," "an incalculable amount," and "the potential to impose crushing financial costs." Petr. Brief 20, 26, 38 (heading), 41, 42, 48. This is hyperbole, at best.

plaintiff cases may be "divest[ed] of their profits." *Id.*[5] It may also be based on a misunderstanding of restitution in these cases, reflected in the inapposite quotation from *Fletcher v. Security Pac. Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979). See U.S. Brief 24. As the California Supreme Court has made clear, *Fletcher* "held that once an unfair trade practice was established, *a class action could proceed* without individualized proof of lack of knowledge of the fraud." *Kraus*, 999 P.2d at 730 (emphasis added); *see id.* at 731 ("*Fletcher* addressed the propriety of a class action . . . .").[6] Similarly, Nike quotes the statement in *Bank of the West v. Superior Court*, 833 P.2d 545, 553 (Cal. 1992), that the court may "order restitution without individualized proof of deception, reliance, and injury." See Petr. Brief 4, 45. But that case too was concerned with the proof required for restitution in a class action, as were the two cases the court cited for the quoted statement, *Fletcher* and *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 668-69 (Cal. 1983) (relying on *Fletcher*). Thus, while restitution may be ordered in class actions "without *individualized* proof of deception, reliance, and injury" (emphasis added), in private-plaintiff actions that are not certified as class actions restitution is limited to claimants who can be located and who make individual claims for refunds. See *supra* at 9, 21.

Furthermore, these laws do not provide for attorney's fees. *See Cel-Tech*, 973 P.2d at 539. Thus, the only way to obtain

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[5] The United States seems to have been misled by a sentence that was removed from the opinion below. See U.S. Brf 24 (citing Pet. App. 6a; for modification of opinion, see *id.* 65a). In the underlying quotation from *Kraus*, 999 P.2d at 725, the court was simply explaining what "disgorgement" means. *See Korea Supply*, 29 Cal.4th at 1145.

[6] At Petr. Brief 4, Nike quotes from *Kraus*, 999 P.2d at 730, but fails to note that *Kraus* was summarizing and discussing *Fletcher*. Nike also quotes from *State Farm Fire & Casualty Co. v. Superior Court*, 53 Cal. Rptr. 2d 229, 235 (Cal. Ct. App. 1996), but the statement quoted concerns proof of a violation, not restitution.

an award of attorney's fees is to meet the requirements of the generally applicable "'private attorney general' attorney fee doctrine." *Woodland Hills Residents Ass'n, Inc. v. City Council*, 593 P.2d 200, 208 (Cal. 1979). As specified by statute, the action must have "resulted in the enforcement of an important right affecting the public interest," and it must also, among other things, have conferred "a significant benefit . . . on the general public or a large class of persons." Cal. Civ. Pro. Code § 1021.5 (App. 52a). The trial court applies these statutory criteria in determining "whether or not plaintiff's counsel is entitled to any attorney fees and, if so, what constitutes a 'reasonable' fee.'" *Stop Youth Addiction*, 950 P.2d at 1101.

The defendant also has the right to file a "SLAPP" motion under California's anti-Strategic Lawsuits Against Public Participation statute. Cal. Civ. Pro. Code § 425.16 (App. 49a). A SLAPP suit asserts a claim against a defendant "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." *Id.* § 425.16(b)(1). As the Ninth Circuit has explained, the "anti-SLAPP statute was 'enacted to allow early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation.'" *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). The statute enables a defendant to move to strike the complaint at the outset of the case before any discovery, which is then stayed. § 425.16(f), (g). If the defendant shows that "'the plaintiff's suit arises from an act in furtherance of the defendant's rights of petition or free speech,'" the burden shifts to the plaintiff to establish "'a probability of prevailing on the challenged claim.'" *Vess*, 317 F.3d at 1110. If the motion is granted, the defendant is awarded attorney's fees and costs; if denied, the defendant has the right to an immediate appeal, in which the ruling is reviewed de novo. § 425.16(c), (j); *see, e.g., Matson v. Dvorak*, 46 Cal. Rptr. 2d

880, 886 (Cal. Ct. App. 1995). The Legislature has instructed the courts to construe the statute "broadly," § 425.16(a), and they have: "California and federal courts have repeatedly permitted defendants to move to strike under the anti-SLAPP statute despite the fact that they were neither small nor championing individual interests." *Vess*, 317 F.3d at 1109.

The judicial process provides additional safeguards. Unlike the FTC Act, California law does not authorize cease-and-desist orders. See U.S. Brief 15. The unfair-competition law is "a meaningful consumer protection tool" because it allows consumers "to combat unfair competition by seeking an injunction against unfair business practices." *Korea Supply*, 29 Cal.4th at 1152. In seeking such an injunction, private plaintiffs are required in a non-jury trial both to prove the elements of the claim and to prove that they "qualify, in light of all relevant considerations, for an actual award of injunctive relief." *Stop Youth Addiction*, 950 P.2d at 1101 n.12. Moreover, upon challenge by the defendant, the trial court must determine whether the action is "one brought by a competent plaintiff for the benefit of injured parties." *Kraus*, 999 P.2d at 733. And because relief is not mandatory, the defendant is entitled to offer "equitable considerations" against the remedy sought. See *supra* at 9.

Also, the attorney filing the complaint "certif[ies]" that the asserted claims are legally "warranted" and that the factual allegations have "evidentiary support." Cal. Civ. Pro. Code § 128.7(b) (App. 46a). "If these standards are violated, the court can impose an appropriate sanction sufficient to deter future misconduct, including a monetary sanction." *Stop Youth Addiction*, 950 P.2d at 1101. Finally, because the California Attorney General has "a particular interest" in the interpretation of these laws, the Legislature has required that the Attorney General and the local district attorney receive notice and copies of the briefs in any appellate proceeding. *Lavie*, 129 Cal. Rptr. 2d at 491; *see* Cal. Bus. & Prof. Code §§ 17209, 17536.5 (App. 38a, 44a).

2. The United States contends that the provision for private-plaintiff suits "has the capacity to chill protected speech." U.S. Brief 20. This contention fails because it ignores the safeguards and protections just outlined. It also effectively amounts to the contention that private plaintiffs lack Article III standing. See *id.* 26-27. But federal standing requirements do not bind the states, *see, e.g.*, *ASARCO*, 490 U.S. at 617, and there is no showing of any incremental chilling effect from actions brought by plaintiffs without federal standing.

Nike likewise ignores California's safeguards and protections and fails to show an impermissible chilling effect. See Petr. Brief 38-43. Nike asserts that the ruling below reflects the "court's commitment to construe the already broad terms of the [unfair-competition and false-advertising laws] as expansively as possible." *Id.* 38. The court, however, was not construing these laws. It was deciding whether Nike's representations were "commercial speech." And since the laws do not go beyond the limits of commercial speech, their breadth is beside the point anyway.

Nike adds an interpretation of the laws' "'deterrence' rationale." *Id.*; also *id.* 3. The California Supreme Court has explicitly rejected this kind of distorted interpretation: "While . . . the Legislature considered deterrence of unfair practices to be an important goal, . . . deterrence by means of monetary penalties is not the act's sole objective. A court cannot . . . award whatever form of monetary relief it believes might deter unfair practices." *Korea Supply*, 29 Cal.4th at 1148.

Nike next contends that "[t]he chilling effect of the legal regime approved by the court below is fact," the proof being that it has caused Nike to restrict "its communications on social issues that could reach California consumers." Petr. Brief 38-39. When Nike made this claim in its petition for certiorari, respondent pointed out that Nike continued to discuss the very same issues on its Web site. See Cert. Opp. 27. Nike replied that its claim is "indisputable." Cert. Reply

7 n.4. Nike is still discussing these issues (e.g., "Factory Conditions") on its Web site. See <http://www.nike.com/nikebiz/nikebiz.jhtml?page=0> (visited Mar. 31, 2003). No doubt Nike will reply that its claim remains "indisputable."

Nike then asserts that California's laws impose "strict liability"; go beyond "traditional advertising"; apply to speech "in any format and in any forum"; attach liability to "entirely truthful communications" that have less value to a company's "bottom line" than the cost of litigation; apply to "misleading" statements that "allegedly 'omit'" any of a "range of supposed 'facts'"; and "restrain statements of fact." Petr. Brief 40-42. Each of these assertions is equally true of § 5 of the FTC Act.

Nike also supports the claimed chilling effect by asserting that "obviously" it was under a "'practical compulsion'" to speak, so that its commercial speech was "'inextricably intertwined' with noncommercial speech." *Id.* 43. But Nike fails to identify anything in the complaint to show that it was required, either legally or in the nature of things, to engage in this commercial speech. *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989). And Nike fails to identify any noncommercial speech in the complaint with which its commercial speech was assertedly intertwined.

C. Nike fails to show that the "actual malice" standard is required.

Nike contends that, "[w]holly apart from the unique features" of California's laws, respondent's "causes of action violate the First Amendment because they would impose strict liability, or at least liability based on mere negligence, for misstatements on matters of public concern." Petr. Brief 44. Nike assumes here that its false representations are commercial speech. *Id.* 19-20, 37. Thus, according to Nike, "the 'actual malice' standard" is required in cases of false commercial speech on matters of public concern. *Id.* 43 (heading). Nike did not raise this argument below, and the

California Supreme Court did not address it. Hence, this Court should refuse to consider it. See *supra* at 18-20.

In addition, if this argument is accepted, the actual-malice standard will be required as well in cases under § 5 of the FTC Act and comparable state laws. See U.S. Brief 15 n.5. Moreover, as Justice Brown noted, dissenting below, "an actual malice standard may be too high because these representations undoubtedly influence some consumers in their buying decisions, and the government has a strong interest in minimizing consumer deception." Pet. App. 63a.

III. Nike's factual representations about the conditions under which its products are made, as alleged in the complaint, are commercial speech subject to laws regulating false or misleading commercial messages.

A. The First Amendment permits the government to regulate false or misleading commercial speech.

The First Amendment protects commercial speech to safeguard "the free flow of commercial information." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 764, 765 (1976). As relevant here, this means that commercial speech is protected because it conveys truthful information to consumers for them to rely on in making informed purchasing decisions. *See, e.g., Greater New Orleans Broadcasting Assoc., Inc. v. United States*, 527 U.S. 173, 195 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion). By contrast, when commercial information is false or misleading, it causes "commercial harms." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 & n.21 (1993). Hence, the Court has repeatedly declared that false or misleading commercial speech "is not protected by the First Amendment." *Thompson v. Western States Medical Ctr.*, 122 S.Ct. 1497, 1504 (2002); *accord Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001); *Greater New Orleans*, 527 U.S. at 183; *Florida Bar v. Went For It, Inc.*, 515 U.S. 618,

623-24 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995); *Board of Trustees*, 492 U.S. at 475; *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 340 (1986); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68-69 (1983); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507 (1981) (plurality opinion); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

Thus, the First Amendment permits the government to regulate "false, deceptive, or misleading commercial speech." *Ibanez v. Florida Dept. of Bus. & Prof. Regulation*, 512 U.S. 136, 142 (1994); *see, e.g., Edenfield v. Fane*, 507 U.S. 761, 768 (1993); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985). The complaint alleges that Nike's representations violated California laws regulating just this kind of commercial speech. Hence, the only regulatory interest implicated here is "the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. This case therefore raises no issue about other grounds for regulating commercial speech; in particular, it raises no issue about "applying the *Central Hudson* framework." *Thompson*, 122 S.Ct. at 1504.

B. Nike's false representations of fact about the conditions under which its products are made, as alleged in the complaint, are properly classified as commercial speech.

Respondent will argue that Nike's false representations, as alleged in the complaint, are commercial speech and are thus subject to laws regulating false or misleading commercial messages.[7]

Nike's contrary argument would greatly limit the category of commercial speech. See Petr. Brief 21-36. According to

[7] The false representations alleged in the complaint are affirmative representations of fact. See *supra* at 4-5. Hence, Nike's references to liability for "literally true statements" and for acting "by omission" are irrelevant. Petr. Brief 3, 6; also *id.* 41, 42.

Nike, speech is not commercial unless it "addresses the qualities of a product as such (like its price, availability, or suitability)" and appears in an "advertisement" or a "product label." *Id.* 21 (also *id.* 6, 24, 27, 30 (heading), 34 & n.9, 35, 36). As will be shown, commercial speech is not so limited. The United States agrees. See U.S. Brief 27-28.

1. Nike's representations about the conditions under which its products are made provided factual information for consumers to rely on in their purchasing decisions.

Representations concerning a company's production practices give consumers information to rely on in making informed purchasing decisions, as the United States points out: "In today's environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more to achieve desirable environmental or social ends." U.S. Brief 28. Thus, many consumers do not want to buy goods made under illegal, unsafe, or inhumane conditions. See *supra* at 6. For these consumers, it is important to know, for example, whether Nike's shoes are produced in compliance with laws governing wages and working hours in the countries of manufacture and whether conditions in the factories satisfy those countries' laws governing health-and-safety and environmental standards. Hence, Nike's representations about the conditions under which its products are made gave consumers factual information to rely on in their purchasing decisions. If this information was false, as alleged in the complaint, these representations caused commercial harm.

There is nothing unusual in requiring that claims like these be truthful. In familiar cases of commercial speech, companies give consumers information about the circumstances under which their goods are produced. These representations

are subject to laws regulating false or misleading commercial messages:

U.S. origin. For over 60 years, the FTC has regulated claims that a product is of U.S. origin under § 5 of the FTC Act. *See* "Made in USA" and Other U.S. Origin Claims, 62 Fed. Reg. 63,755 at 63,756 & n.1 (1997).[8] Indeed, when this Court wished to illustrate commercial speech that is of "general public interest," it chose, as a clear example, the "domestic producer" who "advertises his product as an alternative to imports that tend to deprive American residents of their jobs." *Virginia Pharmacy*, 425 U.S. at 764.

In 1995, the FTC undertook a policy review to consider whether its traditional standard—that a product must be "all or virtually all" made in the United States to support such a claim—"remained consistent with consumer perceptions and continued to be appropriate in today's global economy." 62 Fed. Reg. at 63,756. In 1997, after finding that consumers "prefer buying U.S.-made goods" and "feel very strongly that the current standard should be retained," the FTC announced that it would continue to enforce its traditional standard. *Id.* at 63,764-65. At the same time, the FTC issued an Enforcement Policy Statement on U.S. Origin Claims outlining the factors that it would consider in determining whether such claims are

[8] Other laws regulating false U.S.-origin claims include the Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1)(B) (App. 1a) (prohibits making "false or misleading representation of fact" that, "in commercial advertising or promotion, misrepresents the . . . geographic origin of . . . goods"); Cal. Bus. & Prof. Code § 17533.7 (App. 40a) (prohibits selling product that is not made in United States if on product or its container "there appears the words 'Made in U.S.A.,' 'Made in America,' 'U.S.A.,' or similar words"); Cal. Civ. Code § 1770(a)(4) (App. 46a) (in "transaction intended to result" in sale of goods, prohibits "deceptive representations or designations of geographic origin").

deceptive. *Id.* at 63,766-71.[9] The FTC applies the principles in this Statement "to U.S. origin claims included in labeling, advertising, other promotional materials, and all other forms of marketing." *Id.* at 63,767. Since that time, the FTC has successfully brought a number of enforcement actions against companies for violating § 5 by falsely representing that their goods are made in the United States.[10]

Nature of labor. The FTC long ago determined that false representations that goods are made by members of a labor union violate § 5. In *Columbia Pants Mfg. Co.*, 13 F.T.C. 61 (1929), the FTC found that "[a] substantial portion of the purchasing public . . . prefers to purchase . . . articles manufactured in factories . . . employing . . . workers belonging to, or affiliated with, some union of organized labor." *Id.* at 64. The FTC barred the seller from "advertising or in any manner representing" that its products were "'Union Made'" unless they were in fact "made by union labor." *Id.* at 66. An example of recent vintage would be a coffee chain promoting a particular blend of its coffee as "Fair Trade" coffee, claiming that the coffee beans are purchased from small farmers and cooperatives at a price above the world market price.[11]

[9] Nike asserts that a U.S.-origin claim concerns a matter "entirely within the corporation's control." Petr. Brief 40. This assertion is incorrect. *See* 62 Fed. Reg. at 63,768-69.

[10] *See, e.g., Black & Decker Corp.*, 2001 FTC LEXIS 20 (Feb. 8, 2001) (locks and lock systems); *Stanley Works*, 127 F.T.C. 807 (1999) (mechanics tools); *American Honda Motor Co.*, 127 F.T.C. 461 (1999) (lawn mowers); *Kubota Tractor Corp.*, 127 F.T.C. 444 (1999) (lawn and garden tractors); *Johnson Worldwide Assocs., Inc.*, 127 F.T.C. 430 (1999) (fishing line).

[11] Other laws regulating false representations about the nature of the labor employed in making a product include Cal. Lab. Code § 1012 (App. 53a) (prohibits "falsely stat[ing] that members of trades unions, labor associations, or labor organizations" were employed in making product); Cal. Bus. & Prof. Code § 17522 (App. 40a) (prohibits falsely indicating by "label, symbol, trade name, or name of manufacturer" that goods were

Dolphin-safe tuna. In the Dolphin Protection Consumer Information Act, Congress expressed its findings that dolphins "are frequently killed in the course of tuna fishing operations" and that "consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins." 16 U.S.C. § 1385(b) (App. 1a). The Act prescribes that, if tuna was harvested by certain fishing methods, it is a violation of § 5 of the FTC Act to include on the label of the tuna product "the term 'Dolphin Safe' or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins." *Id.* § 1385(d)(1). The Department of Commerce has issued detailed implementing regulations. 50 C.F.R. 216.90-96. The FTC would find that a company violated § 5 by making a false "dolphin safe" claim, whether on its tuna label or in its advertising or other promotional material. See U.S. Brief 28.

Environmental marketing. The FTC's Guides for the Use of Environmental Marketing Claims "address the application of Section 5 of the FTC Act to environmental advertising and marketing practices." 16 C.F.R. 260.1 (App. 5a); *see Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 733 (9th Cir. 1994) (noting that environmental claims appeal to "ecologically-minded consumers").[12] The Guides apply to claims "about the environmental attributes of a product" that are "included in labeling, advertising, promotional materials and all other forms of marketing." 16 C.F.R. 260.2(a) (App.

"made by blind workers"); 18 U.S.C. § 1159(a) (App. 4a) (prohibits selling product "in a manner that falsely suggests it is Indian produced"); Cal. Bus. & Prof. Code § 17569 (App. 45a) (prohibits selling article falsely "represented as made by authentic American Indian labor").

[12] In California, it is unlawful to make any "untruthful, deceptive, or misleading environmental marketing claim," which is defined to include any claim contained in the FTC's Guides. Cal. Bus. & Prof. Code § 17580.5(a) (App. 45a).

5a). The Guides explain that, under § 5, it is deceptive to misrepresent, for example, that goods offer a general environmental benefit, such as that they are "Environmentally Friendly," or that they are biodegradable, compostable, recyclable, or "ozone safe." *Id.* 260.7(a)-(d), (h) (App. 11a-21a, 27a). Some of the examples given describe claims that are deceptive because of the environmental effects of a "product's manufacture" or "production." *Id.* 260.6(c) (ex. 4), 260.7(a) (ex. 2) (App. 10a, 12a). Typical instances of environmental claims about the means of production would include companies' claiming that produce is grown without using pesticides that cause harmful environmental effects; that electricity is produced in an environmentally safe way (e.g., from wind or solar power); and that wood products are made using sustainable harvesting practices. The United States suggests another example: the FTC would find that a coffee company violated § 5 by falsely representing that its coffee was grown using "rain-forest-protective practices." U.S. Brief 28.

In these cases, then, companies provide consumers with information about the circumstances under which goods are produced so that they can rely on the information in their purchasing decisions. Consumers want this information because, in deciding whether to buy the products, they are concerned about preserving American jobs, supporting union (or other types of) labor, preventing harm to dolphins, or protecting the environment. As the United States observes with regard to its own examples: "Although those representations say nothing about the actual quality of the product and deal with production practices thousands of miles away, they nevertheless influence consumer choice and allow sellers to command premiums from consumers who are willing to pay more to protect rain forests or marine mammals." *Id.*

According to Nike, however, this case has to do not with commercial harm, but with consumers' "moral judgments." Petr. Brief. 35-36 (quoting heading, *id.* 35). But contrary to Nike's assertion, the complaint does not allege an attack on

"the public's perception of Nike as a moral company." *Id.* 5. Nor is there any such "theory" in the complaint. *Id.* 36. Moreover, what Nike actually means by a consumer's "'*moral* judgment' about the *seller*" is that the consumer's decision to buy a product is not based "just on price and quality." *Id.* 27. Nike's terminology therefore adds nothing to its contention that speech is commercial only if it "addresses the qualities of a product as such (like its price, availability, or suitability)." *Supra* at 29.[13]

2. In making these representations, Nike's purpose was to induce purchases by consumers.

Nike's representations were "promotional in nature," seeking "to benefit the economic interests of the speaker by promoting sales of its products." *R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 546 (1988); *see In re Primus*, 436 U.S. 412, 438 n.32 (1978) (distinguishing between noncommercial speaker whose speech was "intended to advance 'beliefs and ideas'" and commercial speaker whose "purpose was the advancement of his own commercial interests"). It is true that almost anything a company does or says may have an economic motivation, whether the company is building a new plant or supporting favorable legislation, and thus may ultimately serve the purpose of "promoting sales of its products." But Nike's purpose was much more specific.

Nike sought to maintain its sales and profits by appealing to consumers, such as directors of athletics, who would believe its representations about the conditions in its production facilities and therefore buy its goods. In making these representations, then, Nike's purpose was "to affect purchasing decisions by the receivers of the information." *R.J. Reynolds*, 111 F.T.C. at 546. Nike's speech thus sought

[13] If one were to accept Nike's idiosyncratic and self-serving terminology, one would have to say that consumers are making a "moral judgment about the seller" in all of the examples discussed above, including those cited by the United States.

to "benefit the economic interests of the speaker by influencing the reader or listener in the role of consumer." *Id.* In short, as the complaint alleges, Nike's purpose was to induce consumers to buy its products. See *supra* at 6.

3. The Nike communications containing these representations are recognized forms of expressing commercial speech.

The classification of speech as commercial depends on "the content of the expression." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 538 n.5 (1980); *see Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977). No particular form of communication is required. *See, e.g., Ibanez*, 512 U.S. at 138 (attorney referred to accounting credentials "in her advertising and other communications with the public"). Thus, the FTC applies § 5 to false claims that are "included in labeling, advertising, promotional materials and all other forms of marketing." Guides, 16 C.F.R. 260.2(a) (App. 5a); Enforcement Policy Statement, 62 Fed. Reg. at 63,767. Put the other way, no particular type of communication can be ruled out in advance as a means of expressing commercial speech. The United States agrees. See U.S. Brief 28 n.13 ("The forum for such statements is simply not dispositive.").

Here, the letter from Nike's Director of Sports Marketing to university presidents and directors of athletics was a direct mailer to customers and potential customers. Cmplt. ¶¶ 14, 25, Ex. R. Nike's illustrated pamphlet, entitled "Nike Production Primer," was a marketing tool like those distributed by many companies in which the company promotes its goods in various ways, in this case on the basis of Nike's production practices. *Id.*, Ex. V.

The page with Nike's logo posted on its Web site was a direct communication with consumers, like other marketing statements on the Internet. *Id.*, Ex. U. For example, in one of the FTC's enforcement actions against false U.S.-origin

claims, the company stated on its Web site that it "produces all of its products in the United States." *Black & Decker Corp.*, 2001 FTC LEXIS 20, at *2, *12 (Feb. 8, 2001). The same point applies to the press release with Nike's logo posted on its Web site. Cmplt., Ex. II. The term "press release" is a misnomer for such a posting, since viewers read it directly.[14]

The document on Nike's letterhead with Nike's logo was another direct communication with consumers. *Id.*, Ex. P. The other Nike communications were public statements that are also acknowledged means of conveying commercial speech. *Id.*, Exs. D, Q, Z, DD. Thus, securities-fraud liability may be based on disseminating false or misleading information in press releases and public documents. *See, e.g., Basic Inc. v. Levinson*, 485 U.S. 224, 227 & n.4, 228, 247 (1988) ("public material misrepresentations" in newspaper news item, press release, and report to shareholders); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 35 (1st Cir. 2002) ("direct statements to public" in press releases and "quotes of company officials" in news media). It is possible to provide consumers with false commercial information in the same ways. Indeed, press releases and public letters may be considered "free advertising." *See Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 114 (6th Cir. 1995) ("The phrase 'free advertising,' far from being an oxymoron, aptly describes the publicity manufacturers may receive in press releases, news interviews, or trade publications.").

In sum, these public statements and postings on Nike's Web site were written corporate communications, prepared for publication and designed to reach consumers. They are all recognized forms of expressing commercial speech.

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[14] Nike frequently promotes its products in this way. See <http://www.nike.com/nikebiz/nikebiz.jhtml?page=11> (visited Mar. 31, 2003) (Nike "press releases" promoting, inter alia, basketball shoe on Feb. 5, 2003; children's athletic shoe on Nov. 6, 2002; apparel assertedly made of "organic" cotton on Oct. 7, 2002).

4. Nike's representations have the characteristics supporting the government's right to regulate false or misleading commercial speech.

The Court has explained that "[t]wo features of commercial speech permit regulation of its content." *Central Hudson*, 447 U.S. at 564 n.6. First, "commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages . . . . " *Id.* Without citing the complaint, Nike claims that this characteristic is lacking here, because its representations were not subject to "easy verification." Petr. Brief 20; also *id.* 21 n.3. But the circumstances under which its goods are produced are objectively verifiable matters, and Nike's corporate communications assured consumers that it knew the facts about the conditions and practices in its production facilities. Thus, Nike was eager to tell consumers that, on a daily basis, it has "1,000 Nike employees monitoring working conditions." Cmplt., Ex. S (Petr. Lodg. 193); also Exs. P, Q, R, U, V, Z (Petr. Lodg. 184, 187, 190, 198, 208, 270). Nike also claimed that it had the "great advantage" of "know[ing] what is happening on wages." Ex. D (Petr. Lodg. 122). Indeed, Nike prepared a graphic table to show that the average workers are paid twice the minimum wage. Exs. V, Z (Petr. Lodg. 220, 270).

Second, "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Central Hudson*, 447 U.S. at 564 n.6. Without citing the complaint, Nike claims that this characteristic is lacking, too, because its representations did not make "an essential contribution to the speaker's financial bottom-line." Petr. Brief 20; also *id.* 21 n.3. In fact, the complaint alleges that Nike made the representations in order to maintain and increase its sales and profits. See *supra* at 6.

The Court has also noted another characteristic: "[A]ny concern that strict requirements for truthfulness will unde-

sirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated." *Bates*, 433 U.S. at 383. Without citing the complaint, Nike claims that it made "on-the-spot responses to accusations." Petr. Brief 40. But the complaint does not allege any such extemporaneous statements. On the contrary, Nike's representations were in written corporate communications that were prepared for publication. See *supra* at 5-6, 35-36. One of them for example, was a 33-page illustrated pamphlet. See Cmplt., Ex. V.

5. Nike's representations meet the Court's tests for commercial speech.

1. The Court has consistently held that "speech proposing a commercial transaction" is commercial speech. *Cincinnati*, 507 U.S. at 422; *see Board of Trustees*, 492 U.S. at 473-74; *Zauderer*, 471 U.S. at 637; *see also Lorillard*, 533 U.S. at 554 (noting Court's "recognition of the 'distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech'"); *accord, e.g., United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978). The complaint meets this test, because it alleges that Nike sought to induce sales transactions by making factual representations about its production practices aimed at consumers who do not want to buy goods made under illegal, unsafe, or inhumane conditions.

For example, Nike's Director of Sports Marketing wrote to university presidents and directors of athletics, including those at the more than 200 schools with which Nike has "promotional arrangements." Cmplt. ¶¶ 14, 25, Ex. R. The recipients were officials of entities that have business relationships with Nike, that are major purchasers and potential purchasers of its products, and that represent the huge market of student-consumers, who buy its goods at campus stores. Nike's purpose in making the representations in this letter

was, the complaint alleges, to maintain and increase its sales and profits by persuading these consumers to buy or continue to buy its products. See *supra* at 6.

The letter conveyed factual information about the production of Nike's goods for the officials to rely on in their purchasing decisions. As relevant here, Nike represented that its goods are made in compliance with the laws governing wages and overtime, occupational health-and-safety, and environmental standards in the countries of manufacture. Cmplt. ¶¶ 25, 30, 39, Ex. R. Thus, the letter provided assurances to these officials on issues important to them and their students about the circumstances under which Nike's products are made. This information, if believed, allayed their concerns and made them more likely to remain or become Nike's customers. *See* FTC Deception Policy Statement, in *Cliffdale*, 103 F.T.C. at 182 ("A 'material' misrepresentation . . . is one which is likely to affect a consumer's choice of or conduct regarding a product. In other words, it is information that is important to consumers."). Hence, Nike's representations promoted transactions with consumers and therefore "proposed commercial transactions."

2. Relying on a combination of three factors, the Court has also determined that "informational pamphlets discussing the desirability and availability of prophylactics" were commercial speech. *Bolger*, 463 U.S. at 62, 66-67. These factors are present here. One is the speaker's "economic motivation," which is present because Nike's purpose was to induce consumers to buy its goods. *Id.* at 67.

The informational pamphlets were also "conceded to be advertisements." *Id.* at 66. But the eight-page pamphlet, "Plain Talk About Venereal Disease," was not in advertising "format," a word the Court did not use. *Id.* at 62 n.4. Thus, it was an "advertisement" because it was promotional material. *See Cincinnati*, 507 U.S. at 422 (referring to *Bolger* mailings as "promotional materials"). Here, the Nike communications,

including the representations at issue, were likewise promotional materials. See *supra* at 5-6, 35-36.

The other *Bolger* factor is "reference to a specific product." 463 U.S. at 66. The same informational pamphlet, however, discussed condoms "without any specific reference" to the company's products until the end, where the company was identified "as the distributor of Trojan-brand prophylactics." *Id.* at 66 n.13. The parallel would be a Nike pamphlet discussing athletic shoes without any specific reference to Nike's products until the end, where Nike would be identified as the producer of Nike's athletic shoes. Here, by contrast, the Nike communications referred specifically to its products, and the representations at issue gave consumers information about the means used to produce those products.

3. The Court has also characterized commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. This is a "broader definition of commercial speech." *Cincinnati*, 507 U.S. at 423. It also is met here. As to the audience, the *Central Hudson* regulation applied to the promotion of "electricity consumption by touting its environmental benefits." 447 U.S. at 562 n.5. Thus, speech meets this test when it seeks to sell a product by appealing to consumers' concern about the environment. Similarly, here, Nike's appeal was to consumers' concern about buying products made under illegal working conditions. As to the speaker, the *Central Hudson* regulation applied to "all advertising 'clearly intended to promote sales.'" *Id.* Nike's representations were likewise intended to promote sales. See *supra* at 6.

Without citing the complaint, Nike asserts that it was "also concerned" with government action and with employee morale. Petr. Brief 22-23. The complaint alleges no such purposes. Nike then misrepresents the California Supreme Court as having "deemed it irrelevant that *Nike's statements . . . sought to* 'influence lenders, investors, or lawmakers.'" *Id.*

23 (emphasis added). The court was discussing a general proposition, not "Nike's statements." See Pet. App. 28a.

C. Nike's representations about the conditions under which its products are made, as alleged in the complaint, have no immunity from laws regulating false or misleading commercial messages.

1. Nike's false representations are not immune from regulation on the ground that they addressed matters of public importance.

1. Nike asserts that the false representations at issue addressed "matters of public importance." Petr. Brief 21-36 (quoting heading, *id.* 21; also *id.* 26, 29, 32, 34). But it has never been doubted that the subject of commercial speech—the information conveyed to consumers to rely upon in making informed purchasing decisions—may be a matter of public importance or "public concern." *Id.* 25 (heading); *see Greater New Orleans*, 527 U.S. at 184-85; *Bolger*, 463 U.S. at 69; *Carey v. Population Servs. Int'l*, 431 U.S. 678, 700-01 (1977); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96 (1977); *Virginia Pharmacy*, 425 U.S. at 764; *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). Thus, the importance of the subject matter—Nike's own production practices—does not mean that Nike's representations have immunity from laws regulating false or misleading commercial messages.

2. But Nike's repeated assertions that its speech addressed issues of "public importance" (and the use of similar phrases, such as "important social, political, and moral issues," Petr. Brief 36) may create the false impression that Nike made these representations in "a broader debate on more general matters of public concern." U.S. Brief 27. The complaint's allegations do not show any such broader debate. The only "debate" in the complaint concerned factual questions about the circumstances under which Nike's goods are produced, such as whether the female workforce was being illegally exposed to dangerous reproductive toxins. See *supra* at 3-5.

Moreover, it is possible for a company to engage in commercial speech as part of a broader debate on more general public matters. *See Bolger*, 463 U.S. at 67-68; *Central Hudson*, 447 U.S. at 563 n.5. The United States agrees. See U.S. Brief 28 n.13 (citing examples of commercial speech in context of issues "such as sound forest or ocean management"). This speech is not immune from regulation if false, because the "company has the full panoply of protections available to its *direct* comments on public issues." *Bolger*, 463 U.S. at 68 (emphasis added); *see Posadas*, 478 U.S. at 340 n.7; *Zauderer*, 471 U.S. at 638 n.7; *Pittsburgh Press Co v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973).

When a company comments *directly* on a public issue, it discusses a subject that is independent of itself and its products and activities. *See, e.g., Consolidated Edison*, 447 U.S. at 532-33 (utility placed inserts in billing envelopes expressing its "'opinions or viewpoints on controversial issues of public policy,'" such as "'the desirability of future development of nuclear power'"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 769 (1978) (bank opposed state constitutional amendment submitted to voters as referendum that would have allowed new income tax); *Pacific Gas & Elec. Co. v. Berkeley*, 131 Cal. Rptr. 350, 351, 353 (Cal. Ct. App. 1976) (utility opposed local measure authorizing city to take over utility's facilities within city). In doing so, the company may make statements of fact in support of its position, and presumably its speech is economically motivated, but it is not seeking to persuade consumers to buy its goods, and its speech does not serve "the informational function of commercial decision-making." *R.J. Reynolds*, 111 F.T.C. at 546. Rather, the company is expressing its views on the public issue that is the subject of debate. Thus, it is not engaged in commercial speech.

Here, Nike was not commenting directly on any public issues. Nike's representations concerned only the production of its own goods. See *supra* at 4-5.

3. Nike contends that this case "presents a classic dispute between business and labor of the precise sort" protected by *Thornhill v. Alabama*, 310 U.S. 88 (1940). Petr. Brief 27; also *id.* 19, 32-33. *Thornhill* concerned the freedom to publicize "the facts of a labor dispute." 310 U.S. at 99-104. But Nike's representations, as alleged in the complaint, did not concern "the facts of a labor dispute." Hence, Nike's reliance on *Thornhill* raises no issue here.

Moreover, *Thornhill* did not deal with the regulation of false statements. *See* 310 U.S. at 99 ("The statute . . . leaves room for no exceptions based upon . . . the accurateness of the terminology used in notifying the public of the facts of the dispute."). Thus, *Thornhill* emphasized the right "to discuss publicly *and truthfully* all matters of public concern" and the protection afforded to "peaceful *and truthful* discussion of matters of public interest." *Id.* at 101, 104 (emphasis added). Nor does it help Nike to cite the *Thornhill* passage defining public issues as "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.* at 102, quoted in Petr. Brief 32. *Bolger* applied this same definition in holding that the communications there were commercial speech even though they contained "discussions of important public issues." 463 U.S. at 67-68 & n.15. *Thornhill* therefore does not show that Nike's representations have immunity from laws regulating false or misleading commercial messages.

2. Nike's false representations are not immune from regulation on the ground that they were responses to others' allegations.

1. Nike argues that "[i]f the full protections of the First Amendment apply to the allegations," "claim[s]," and "assert[ions]" of noncommercial speakers about the production of Nike's goods, "so too they apply when Nike *responds* to

those allegations." Petr. Brief 28. According to this argument, a company responding to public allegations about the goods it sells is not engaged in commercial speech and, as a result, is "permitted to immunize false or misleading product information from government regulation." *Bolger*, 463 U.S. at 68. This argument conflicts with an important precedent upholding the FTC's enforcement authority; it arbitrarily disregards the interest of consumers in receiving truthful commercial information; and it fails to take into account the company's access to the facts about its own product.

Nike's argument conflicts with *National Comm'n on Egg Nutrition*. In that case, the egg industry had formed a trade association "to counteract what the FTC described as 'anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption.'" 570 F.2d at 159. The trade association placed newspaper advertisements representing that "there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease." The FTC found these representations "false and misleading" under §§ 5 and 12 of the FTC Act and ordered the trade association to stop disseminating them. *Id.* at 159-60.

On review of the FTC's order, the trade association argued that its statements were not commercial speech, because they concerned "an important and controversial public issue." *Id.* at 163. The Seventh Circuit disagreed: "[T]he right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates." *Id.* According to Nike's argument, however, this decision was wrong: the egg industry was responding to public attacks on its product, and thus its statements were not commercial speech and could not be subject to regulation as false or misleading under § 5 of the FTC Act.

Many kinds of companies might be in the position of the egg industry in the egg-cholesterol controversy. For example:

- A producer of lock systems is alleged to be using components made in other countries. In response, the company claims that its locks are produced entirely in the United States.
- A rug importer is alleged to be selling rugs made with child labor. In response, the company claims that it enforces strict age standards that prevent the use of child labor in making its rugs.
- A tuna producer is alleged to be selling tuna harvested with fishing methods that are harmful to dolphins. In response, the company claims that its tuna is "dolphin safe."
- "[A] manufacturer of artificial furs" is alleged to be selling real fur. In response, the company claims that it sells only artificial fur, and it "promotes [its] product as an alternative to the extinction by [its] competitors of fur-bearing mammals." *Virginia Pharmacy*, 425 U.S. at 764.

In each of these examples, the company's representation about its product addresses a matter of public importance, and the representation is false.

According to Nike's argument, however, because the companies are responding to charges against their goods, these representations are not commercial speech. Once public allegations have been made about a company's goods, the company is free to respond by making false claims, knowing that it is immune from regulation under § 5 of the FTC Act and state laws regulating false or misleading commercial messages. Put another way, Nike's argument means that a company's claims about its goods are commercial speech subject to regulation under § 5 and comparable state laws, until someone publicly alleges that the claims are false.

This is an arbitrary result. Consumers have no reason to suppose that, when public allegations are made, the same

claim that was previously subject to government regulation is now immune from that regulation. Whether or not a company's product is the target of allegations, consumers expect to receive, and have the same interest in receiving, truthful commercial information, and the government has the same interest in protecting consumers from commercial deception.

Nor does the company's situation justify this result. First, "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). And second, when responding to such charges, the company can ensure that it does not make false statements of fact about its own product. Whatever information it wishes to convey about its product, the company always has "access to the truth": it is always "in a position to verify the accuracy of [its] factual representations before [it] disseminates them." *Virginia Pharmacy*, 425 U.S. at 777 (Stewart, J., concurring). Hence, there is no need to immunize a company's responses to public allegations about its goods from regulation under § 5 and comparable state laws.

2. The company also has recourse against noncommercial speakers for making false statements of fact about its product. The company can sue them for damages for the injurious falsehood of their statements, whether the cause of action is called product or business disparagement, trade libel, or something else. *See* Restatement (Second) of Torts §§ 623A, 626 & annots. (1977). In particular, "media" defendants are subject to such actions. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 492 n.8 (1984). Three recent cases are illustrative:

• Consumers Union (CU) reported that the Isuzu Trooper, a sports utility vehicle, was prone to roll over, that it was unsafe to operate, and that Isuzu had ignored the "safety problems and thus knowingly placed consumers at risk." *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 66 F. Supp.2d 1117, 1120 (C.D. Cal. 1999). Isuzu brought suit for product disparagement and defamation, alleging that these

statements were false and that CU had published its test results on the Trooper, in part, "to pressure the National Highway Traffic Safety Administration . . . into adopting rollover safety standards." *Id.* In finding that Isuzu was a limited "public figure," the court noted that Isuzu had "injected itself into the public controversy concerning rollover standards" before CU published its results and that, after the publication, Isuzu had "vigorously defended its position" and had "participated in public debate about the Trooper's safety and the efficacy of CU's testing procedures." *Id.* at 1123. The court cited evidence that Isuzu had "distributed several press releases and held a news conference that was broadcast live" nationwide and had "sent letters to Trooper owners, published pamphlets, and made videotapes concerning the Trooper and CU." *Id.* The court also noted that "[t]he safety of the Isuzu Trooper and the steps that Isuzu did or did not take to enhance that safety are clearly a matter of public controversy." *Id.* The court then ruled that Isuzu had raised a genuine issue of fact as to whether CU had acted with actual malice and therefore denied CU's motion for summary judgment on that issue. *Id.* at 1124-26.

• A new variant of a fatal brain disease was diagnosed in Britain and linked with the consumption of beef infected with "Mad Cow Disease." This postulated link "caused panic in Britain." *Texas Beef Group v. Winfrey*, 201 F.3d 680, 682 (5th Cir. 2000). American news media "ran numerous stories on the subject," including articles in *The New York Times*, *The Wall Street Journal*, and *Newsweek*; and "*Dateline*, a popular, 'prime time' television news program, broadcast a report on the subject." In addition, the *Oprah Winfrey Show* addressed the issue in a program on "Dangerous Food." *Id.* Following this broadcast, the fed-cattle markets in the United States dropped drastically. *Id.* at 684. Cattle ranchers then sued Oprah Winfrey, the producers and distributors of the show, and a guest on the show asserting that the program had falsely depicted American beef as unsafe. *Id.* at 682. The

plaintiffs alleged violations of the Texas False Disparagement of Perishable Food Products Act and damages arising from various torts, including business disparagement. *Id.* Only the claim for business disparagement was submitted to the jury. *Id.* at 685. The jury rejected the claim, and the Fifth Circuit affirmed. *Id.* at 689-90 (holding that plaintiffs had not preserved their objection to district court's instructions on business-disparagement claim).

• The Suzuki Samurai, a sports utility vehicle, had been "the subject of news stories that highlighted its instability and propensity to tip over" when CU published an article rating the Samurai "'Not Acceptable' based on its propensity to roll over during accident avoidance tests." *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 292 F.3d 1192, 1194 (9th Cir. 2002). CU submitted a copy of the article and backup information to the National Highway Traffic Safety Administration "in support of a petition to establish a minimum stability standard to protect against unreasonable risk of rollover." *Id.* at 1197. Thereafter, CU continued to refer publicly to the negative Samurai rating, and Suzuki brought suit for product disparagement. *Id.* at 1198. CU moved for summary judgment on the ground that there was insufficient evidence of actual malice. *Id.* The district court granted CU's motion, but the Ninth Circuit reversed, holding that Suzuki had raised a genuine issue of fact as to whether CU had acted with actual malice. *Id.* at 1201-05.

Thus, damages suits can be and are brought against noncommercial speakers, including "media" defendants, for false statements about a company's products, even where the noncommercial speech concerns issues of public health and safety. In these cases, liability may require proof of the noncommercial speaker's "actual malice," i.e., knowledge or reckless disregard of the statements' falsity. *See Bose*, 466 U.S. at 489-90, 492 & n.8, 513 (assuming without deciding that actual malice is required in product-disparagement action by public-figure plaintiff against "media" defendant). But the

jury instructions in *Texas Beef Group* did not require a finding of actual malice. *See* 201 F.3d at 685; *see also* Restatement (Second) of Torts § 623A caveats & com. d (additional common-law standards). Furthermore, the actual-malice requirement is currently under challenge. *See Suzuki*, 292 F.3d at 1200 n.11 ("*Amicus* Washington Legal Foundation devotes a substantial portion of its brief to arguing that the First Amendment does not demand a showing of actual malice for product disparagement claims."). But whatever the scienter standard may be, companies have an available damages remedy against noncommercial speakers.

Injunctions can also be obtained against noncommercial speakers for their false or misleading statements. For example, in the course of a labor dispute with a construction company working at a hospital, a union displayed a banner near the construction site to publicize its dispute with the company. The banner stated that the hospital was "full of rats." *San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1232-33 (9th Cir. 1997). The hospital sued the union for trade libel and libel, and the district court issued a preliminary injunction restricting the union's use of the tern "rats" on its banner. *Id.* at 1233, 1234-35. On appeal, the union argued that it was "publicizing the facts of its labor dispute" and that "its statement was both 'literally and factually' true." *Id.* 1235-36. But the Ninth Circuit affirmed, holding that the hospital had shown a reasonable probability of proving actual malice at trial and that the manner in which the term "rats" was used "was so misleading as to be fraudulent." *Id.* at 1235-37, 1239.

In sum, noncommercial speakers who make statements of fact about a company's product are subject to suit by the company if it thinks that the statements are false. According to Nike's argument, however, when the company responds to the noncommercial speakers by making false statements of fact about the product, the company is immune from regulation under § 5 of the FTC Act and comparable state laws.

3. Nike contends that California's unfair-competition and false-advertising laws amount to unconstitutional "viewpoint discrimination," *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992), because they "apply to commercial sellers but *not* to persons and entities that launch accusations against those sellers." Petr. Brief 35. But the same is true of § 5 of the FTC Act and, presumably, of every other comparable state law. The FTC, for example, had no jurisdiction to apply § 5 to those who made the "'anti-cholesterol attacks on eggs'" in *National Comm'n on Egg Nutrition*, 570 F.2d at 159. See *supra* at 44. Thus, according to Nike's argument, § 5 and the other state laws are unconstitutional and cannot be enforced. In addition, *R.A.V.*'s point was that even though the government may be entitled to prohibit an entire category of speech, such as fighting words, it cannot regulate speech within that category in the face of constitutional limitations, for example, by prohibiting only fighting words that express a particular point of view. *See* 505 U.S. at 388-89, 391-92. Here, California's laws regulate the entire category of false or misleading commercial speech. Hence, they regulate commercial speech only because of its "constitutionally proscribable content." *Id.* at 383 (emphasis deleted). Finally, Nike's factual representations, as alleged in the complaint, were not expressions of "ideas" or "points of view." Petr. Brief 35; see *supra* at 4-5. In any event, then, this contention raises no issue.

CONCLUSION

For these reasons, the writ of certiorari should be dismissed as improvidently granted or, alternatively, the judgment of the California Supreme Court should be affirmed.

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April 4, 2003

APPENDIX

Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1)

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

Lanham Act § 43(a), 15 U.S.C. § 1125(a)

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385

(a) This section may be cited as the "Dolphin Protection Consumer Information Act."

(b) The Congress finds that—

> (1) dolphins and other marine mammals are frequently killed in the course of tuna fishing operations in the eastern

tropical Pacific Ocean and high seas driftnet fishing in other parts of the world;

(2) it is the policy of the United States to support a world-wide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins; and

(3) consumers would like to know if the tuna they purchase is falsely labeled as to the effect of the harvesting of the tuna on dolphins.

(c) For purposes of this section—

(1) the terms "driftnet" and "driftnet fishing" have the meanings given those terms in section 4003 of the Driftnet Impact Monitoring, Assessment, and Control Act of 1987 (16 U.S.C. 1822 note);

(2) the term "eastern tropical Pacific Ocean" means the area of the Pacific Ocean bounded by 40 degrees north latitude, 40 degrees south latitude, 160 degrees west longitude, and the western coastlines of North, Central, and South America;

(3) the term "label" means a display of written, printed, or graphic matter on or affixed to the immediate container of any article;

(4) the term "Secretary" means the Secretary of Commerce; and

(5) the term "tuna product" means a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.

(d)(1) It is a violation of section 45 of title 15 for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the

term "Dolphin Safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains—

(A) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or

(B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets which do not meet the requirements for being considered dolphin safe under paragraph (2).

(2) For purposes of paragraph (1)(B), a tuna product that contains tuna harvested in the eastern tropical Pacific Ocean by a fishing vessel using purse seine nets is dolphin safe if—

(A) the vessel is of a type and size that the Secretary has determined is not capable of deploying its purse seine nets on or to encircle dolphin; or

(B)(i) the product is accompanied by a written statement executed by the captain of the vessel which harvested the tuna certifying that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphin;

(ii) the product is accompanied by a written statement executed by (I) the Secretary or the Secretary's designee, or (II) a representative of the Inter-American Tropical Tuna Commission, which states that there was an approved observer on board the vessel during the entire trip and that purse seine nets were not intentionally deployed during the trip on or to encircle dolphin; and

(iii) the statements referred to in clauses (i) and (ii) are endorsed in writing by each exporter, importer, and processor of the product.

(e) Any person who knowingly and willfully makes a statement or endorsement described in subsection (d)(2)(B) of this section that is false is liable for a civil penalty of not to exceed $100,000 assessed in an action brought in any appropriate district court of the United States on behalf of the Secretary.

(f) The Secretary, in consultation with the Secretary of the Treasury, shall issue regulations to implement this section not later than 6 months after November 28, 1990, including regulations establishing procedures and requirements for ensuring that tuna products are labeled in accordance with subsection (d) of this section.

(g) Omitted.

(h) The Secretary of State shall immediately seek, through negotiations and discussions with appropriate foreign governments, to reduce and, as soon as possible, eliminate the practice of harvesting tuna through the use of purse seine nets intentionally deployed to encircle dolphins.

(i) Subsections (d) and (e) of this section shall take effect 6 months after November 28, 1990.

18 U.S.C. § 1159(a)

It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

Code of Federal Regulations, Title 16, Part 260

Sec. 260.1 Statement of purpose.

The guides in this part represent administrative interpretations of laws administered by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. These guides specifically address the application of Section 5 of the FTC Act to environmental advertising and marketing practices. They provide the basis for voluntary compliance with such laws by members of industry. Conduct inconsistent with the positions articulated in these guides may result in corrective action by the Commission under Section 5 if, after investigation, the Commission has reason to believe that the behavior falls within the scope of conduct declared unlawful by the statute.

Sec. 260.2 Scope of guides.

(a) These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use.

(b) Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law. The guides themselves do not preempt regulation of other federal agencies or of state and local bodies governing the use of environmental marketing claims. Compliance with federal,

state or local law and regulations concerning such claims, however, will not necessarily preclude Commission law enforcement action under Section 5.

Sec. 260.3 Structure of the guides.

The guides are composed of general principles and specific guidance on the use of environmental claims. These general principles and specific guidance are followed by examples that generally address a single deception concern. A given claim may raise issues that are addressed under more than one example and in more than one section of the guides. In many of the examples, one or more options are presented for qualifying a claim. These options are intended to provide a "safe harbor" for marketers who want certainty about how to make environmental claims. They do not represent the only permissible approaches to qualifying a claim. The examples do not illustrate all possible acceptable claims or disclosures that would be permissible under Section 5. In addition, some of the illustrative disclosures may be appropriate for use on labels but not in print or broadcast advertisements and vice versa. In some instances, the guides indicate within the example in what context or contexts a particular type of disclosure should be considered.

Sec. 260.4 Review procedure.

The Commission will review the guides as part of its general program of reviewing all industry guides on an ongoing basis. Parties may petition the Commission to alter or amend these guides in light of substantial new evidence regarding consumer interpretation of a claim or regarding substantiation of a claim. Following review of such a petition, the Commission will take such action as it deems appropriate.

Sec. 260.5 Interpretation and substantiation of environmental marketing claims.

Section 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce. The Commission's criteria for determining whether an express or implied claim has been made are enunciated in the Commission's Policy Statement on Deception.[1] In addition, any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results. Further guidance on the reasonable basis standard is set forth in the Commission's 1983 Policy Statement on the Advertising Substantiation Doctrine. 49 FR 30999 (1984); appended to Thompson Medical Co., 104 F.T.C. 648 (1984). The Commission has also taken action in a number of cases involving alleged deceptive or unsubstantiated environmental advertising claims. A current list of environmental marketing cases and/or copies of individual cases can be obtained by calling the FTC Consumer Response Center at (202) 326-2222.

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[1] Cliffdale Associates, Inc., 103 F.T.C. 110, at 176, 176 n.7, n.8, Appendix, reprinting letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (1984) ("Deception Statement").

Sec. 260.6 General principles.

The following general principles apply to all environmental marketing claims, including, but not limited to, those described in Sec. 260.7. In addition, Sec. 260.7 contains specific guidance applicable to certain environmental marketing claims. Claims should comport with all relevant provisions of these guides, not simply the provision that seems most directly applicable.

(a) Qualifications and disclosures. The Commission traditionally has held that in order to be effective, any qualifications or disclosures such as those described in these guides should be sufficiently clear, prominent and understandable to prevent deception. Clarity of language, relative type size and proximity to the claim being qualified, and an absence of contrary claims that could undercut effectiveness, will maximize the likelihood that the qualifications and disclosures are appropriately clear and prominent.

(b) Distinction between benefits of product, package and service. An environmental marketing claim should be presented in a way that makes clear whether the environmental attribute or benefit being asserted refers to the product, the product's packaging, a service or to a portion or component of the product, package or service. In general, if the environmental attribute or benefit applies to all but minor, incidental components of a product or package, the claim need not be qualified to identify that fact. There may be exceptions to this general principle. For example, if an unqualified "recyclable" claim is made and the presence of the incidental component significantly limits the ability to recycle the product, then the claim would be deceptive.

Example 1: A box of aluminum foil is labeled with the claim "recyclable," without further elaboration. Unless the type of product, surrounding language, or other context of the phrase establishes whether the claim refers to the foil or the

box, the claim is deceptive if any part of either the box or the foil, other than minor, incidental components, cannot be recycled.

Example 2: A soft drink bottle is labeled "recycled." The bottle is made entirely from recycled materials, but the bottle cap is not. Because reasonable consumers are likely to consider the bottle cap to be a minor, incidental component of the package, the claim is not deceptive. Similarly, it would not be deceptive to label a shopping bag "recycled" where the bag is made entirely of recycled material but the easily detachable handle, an incidental component, is not.

(c) Overstatement of environmental attribute: An environmental marketing claim should not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication. Marketers should avoid implications of significant environmental benefits if the benefit is in fact negligible.

Example 1: A package is labeled, "50% more recycled content than before." The manufacturer increased the recycled content of its package from 2 percent recycled material to 3 percent recycled material. Although the claim is technically true, it is likely to convey the false impression that the advertiser has increased significantly the use of recycled material.

Example 2: A trash bag is labeled "recyclable" without qualification. Because trash bags will ordinarily not be separated out from other trash at the landfill or incinerator for recycling, they are highly unlikely to be used again for any purpose. Even if the bag is technically capable of being recycled, the claim is deceptive since it asserts an environmental benefit where no significant or meaningful benefit exists.

Example 3: A paper grocery sack is labeled "reusable." The sack can be brought back to the store and reused for

carrying groceries but will fall apart after two or three reuses, on average. Because reasonable consumers are unlikely to assume that a paper grocery sack is durable, the unqualified claim does not overstate the environmental benefit conveyed to consumers. The claim is not deceptive and does not need to be qualified to indicate the limited reuse of the sack.

Example 4: A package of paper coffee filters is labeled "These filters were made with a chlorine-free bleaching process." The filters are bleached with a process that releases into the environment a reduced, but still significant, amount of the same harmful byproducts associated with chlorine bleaching. The claim is likely to overstate the product's benefits because it is likely to be interpreted by consumers to mean that the product's manufacture does not cause any of the environmental risks posed by chlorine bleaching. A claim, however, that the filters were "bleached with a process that substantially reduces, but does not eliminate, harmful substances associated with chlorine bleaching" would not, if substantiated, overstate the product's benefits and is unlikely to be deceptive.

(d) Comparative claims: Environmental marketing claims that include a comparative statement should be presented in a manner that makes the basis for the comparison sufficiently clear to avoid consumer deception. In addition, the advertiser should be able to substantiate the comparison.

Example 1: An advertiser notes that its shampoo bottle contains "20% more recycled content." The claim in its context is ambiguous. Depending on contextual factors, it could be a comparison either to the advertiser's immediately preceding product or to a competitor's product. The advertiser should clarify the claim to make the basis for comparison clear, for example, by saying "20% more recycled content than our previous package." Otherwise, the advertiser should be prepared to substantiate whatever comparison is conveyed to reasonable consumers.

Example 2: An advertiser claims that "our plastic diaper liner has the most recycled content." The advertised diaper does have more recycled content, calculated as a percentage of weight, than any other on the market, although it is still well under 100% recycled. Provided the recycled content and the comparative difference between the product and those of competitors are significant and provided the specific comparison can be substantiated, the claim is not deceptive.

Example 3: An ad claims that the advertiser's packageing creates "less waste than the leading national brand." The advertiser's source reduction was implemented sometime ago and is supported by a calculation comparing the relative solid waste contributions of the two packages. The advertiser should be able to substantiate that the comparison remains accurate.

Sec. 260.7 Environmental marketing claims.

Guidance about the use of environmental marketing claims is set forth in this section. Each guide is followed by several examples that illustrate, but do not provide an exhaustive list of, claims that do and do not comport with the guides. In each case, the general principles set forth in Sec. 260.6 should also be followed.[2]

(a) General environmental benefit claims. It is deceptive to misrepresent, directly or by implication, that a product, package or service offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package or service has specific and far-reaching environmental benefits.

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[2] These guides do not currently address claims based on a "lifecycle" theory of environmental benefit. The Commission lacks sufficient information on which to base guidance on such claims

As explained in the Commission's Advertising Substantiation Statement, every express and material implied claim that the general assertion conveys to reasonable consumers about an objective quality, feature or attribute of a product or service must be substantiated. Unless this substantiation duty can be met, broad environmental claims should either be avoided or qualified, as necessary, to prevent deception about the specific nature of the environmental benefit being asserted.

Example 1: A brand name like "Eco-Safe" would be deceptive if, in the context of the product so named, it leads consumers to believe that the product has environmental benefits which cannot be substantiated by the manufacturer. The claim would not be deceptive if "Eco-Safe" were followed by clear and prominent qualifying language limiting the safety representation to a particular product attribute for which it could be substantiated, and provided that no other deceptive implications were created by the context.

Example 2: A product wrapper is printed with the claim "Environmentally Friendly." Textual comments on the wrapper explain that the wrapper is "Environmentally Friendly because it was not chlorine bleached, a process that has been shown to create harmful substances." The wrapper was, in fact, not bleached with chlorine. However, the production of the wrapper now creates and releases to the environment significant quantities of other harmful substances. Since consumers are likely to interpret the "Environmentally Friendly" claim, in combination with the textual explanation, to mean that no significant harmful substances are currently released to the environment, the "Environmentally Friendly" claim would be deceptive.

Example 3: A pump spray product is labeled "environmentally safe." Most of the product's active ingredients consist of volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is deceptive because, absent further qualification, it is

likely to convey to consumers that use of the product will not result in air pollution or other harm to the environment.

Example 4: A lawn care pesticide is advertised as "essentially non-toxic" and "practically non-toxic." Consumers would likely interpret these claims in the context of such a product as applying not only to human health effects but also to the product's environmental effects. Since the claims would likely convey to consumers that the product does not pose any risk to humans or the environment, if the pesticide in fact poses a significant risk to humans or environment, the claims would be deceptive.

Example 5: A product label contains an environmental seal, either in the form of a globe icon, or a globe icon with only the text "Earth Smart" around it. Either label is likely to convey to consumers that the product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claims would not be deceptive if they were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated, provided that no other deceptive implications were created by the context.

Example 6: A product is advertised as "environmentally preferable." This claim is likely to convey to consumers that this product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claim would not be deceptive if it were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which it could be substantiated, provided that no other deceptive implications were created by the context.

(b) Degradable/biodegradable/photodegradable: It is deceptive to misrepresent, directly or by implication, that a product or package is degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonably short period of time after customary disposal. Claims of degradability, biodegradability or photodegradability should be qualified to the extent necessary to avoid consumer deception about: (1) The product or package's ability to degrade in the environment where it is customarily disposed; and (2) The rate and extent of degradation.

Example 1: A trash bag is marketed as "degradable," with no qualification or other disclosure. The marketer relies on soil burial tests to show that the product will decompose in the presence of water and oxygen. The trash bags are customarily disposed of in incineration facilities or at sanitary landfills that are managed in a way that inhibits degradation by minimizing moisture and oxygen. Degradation will be irrelevant for those trash bags that are incinerated and, for those disposed of in landfills, the marketer does not possess adequate substantiation that the bags will degrade in a reasonably short period of time in a landfill. The claim is therefore deceptive.

Example 2: A commercial agricultural plastic mulch film is advertised as "Photodegradable" and qualified with the phrase, "Will break down into small pieces if left uncovered in sunlight." The claim is supported by competent and reliable scientific evidence that the product will break down in a reasonably short period of time after being exposed to sunlight and into sufficiently small pieces to become part of the soil. The qualified claim is not deceptive. Because

the claim is qualified to indicate the limited extent of breakdown, the advertiser need not meet the elements for an unqualified photodegradable claim, i.e., that the product will not only break down, but also will decompose into elements found in nature.

Example 3: A soap or shampoo product is advertised as "biodegradable," with no qualification or other disclosure. The manufacturer has competent and reliable scientific evidence demonstrating that the product, which is customarily disposed of in sewage systems, will break down and decompose into elements found in nature in a short period of time. The claim is not deceptive.

Example 4: A plastic six-pack ring carrier is marked with a small diamond. Many state laws require that plastic six-pack ring carriers degrade if littered, and several state laws also require that the carriers be marked with a small diamond symbol to indicate that they meet performance standards for degradability. The use of the diamond, by itself, does not constitute a claim of degradability.[3]

(c) Compostable.

(1) It is deceptive to misrepresent, directly or by implication, that a product or package is compostable. A claim that a product or package is compostable should be substantiated by competent and reliable scientific evidence that all the materials in the product or package will break down into, or otherwise become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner in an appropriate composting program or facility, or in a home compost pile or device. Claims of compostability should be qualified to the extent necessary

[3] The guides' treatment of unqualified degradable claims is intended to help prevent consumer deception and is not intended to establish performance standards for laws intended to ensure the degradability of products when littered.

to avoid consumer deception. An unqualified claim may be deceptive if: (i) The package cannot be safely composted in a home compost pile or device; or (ii) The claim misleads consumers about the environmental benefit provided when the product is disposed of in a landfill.

(2) A claim that a product is compostable in a municipal or institutional composting facility may need to be qualified to the extent necessary to avoid deception about the limited availability of such composting facilities.

Example 1: A manufacturer indicates that its unbleached coffee filter is compostable. The unqualified claim is not deceptive provided the manufacturer can substantiate that the filter can be converted safely to usable compost in a timely manner in a home compost pile or device. If this is the case, it is not relevant that no local municipal or institutional composting facilities exist.

Example 2: A lawn and leaf bag is labeled as "Compostable in California Municipal Yard Trimmings Composting Facilities." The bag contains toxic ingredients that are released into the compost material as the bag breaks down. The claim is deceptive if the presence of these toxic ingredients prevents the compost from being usable.

Example 3: A manufacturer makes an unqualified claim that its package is compostable. Although municipal or institutional composting facilities exist where the product is sold, the package will not break down into usable compost in a home compost pile or device. To avoid deception, the manufacturer should disclose that the package is not suitable for home composting.

Example 4: A nationally marketed lawn and leaf bag is labeled "compostable." Also printed on the bag is a disclosure that the bag is not designed for use in home compost piles. The bags are in fact composted in yard trimmings composting programs in many communities around the country, but such

programs are not available to a substantial majority of consumers or communities where the bag is sold. The claim is deceptive because reasonable consumers living in areas not served by yard trimmings programs may understand the reference to mean that composting facilities accepting the bags are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of such programs, for example, by stating, "Appropriate facilities may not exist in your area." Other examples of adequate qualification of the claim include providing the approximate percentage of communities or the populatio.' for which such programs are available.

Example 5: A manufacturer sells a disposable diaper that bears the legend, "This diaper can be composted where solid waste composting facilities exist. There are currently [X number of] solid waste composting facilities across the country." The claim is not deceptive, assuming that compost-ing facilities are available as claimed and the manufacturer can substantiate that the diaper can be convert-ed safely to usable compost in solid waste composting facilities.

Example 6: A manufacturer markets yard trimmings bags only to consumers residing in particular geographic areas served by county yard trimmings composting programs. The bags meet specifications for these programs and are labeled, "Compostable Yard Trimmings Bag for County Composting Programs." The claim is not deceptive. Because the bags are compostable where they are sold, no qualification is required to indicate the limited availability of composting facilities.

(d) Recyclable. It is deceptive to misrepresent, directly or by implication, that a product or package is recyclable. A product or package should not be marketed as recyclable unless it can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling

programs and collection sites. If an incidental component significantly limits the ability to recycle a product or package, a claim of recyclability would be deceptive. A product or package that is made from recyclable material, but, because of its shape, size or some other attribute, is not accepted in recycling programs for such material, should not be marketed as recyclable.[4]

Example 1: A packaged product is labeled with an unqualified claim, "recyclable." It is unclear from the type of product and other context whether the claim refers to the product or its package. The unqualified claim is likely to convey to reasonable consumers that all of both the product and its packaging that remain after normal use of the product, except for minor, incidental components, can be recycled. Unless each such message can be substantiated, the claim should be qualified to indicate what portions are recyclable.

Example 2: A nationally marketed 8 oz. plastic cottage-cheese container displays the Society of the Plastics Industry (SPI) code (which consists of a design of arrows in a triangular shape containing a number and abbreviation identifying the component plastic resin) on the front label of the container, in close proximity to the product name and logo. The manufacturer's conspicuous use of the SPI code in this manner constitutes a recyclability claim. Unless recycling facilities for this container are available to a substantial majority of consumers or communities, the claim should be

[4] The Mercury-Containing and Rechargeable Battery Management Act establishes uniform national labeling requirements regarding certain types of nickel-cadmium rechargeable and small lead-acid rechargeable batteries to aid in battery collection and recycling. The Battery Act requires, in general, that the batteries must be labeled with the three-chasing-arrows symbol or a comparable recycling symbol, and the statement "Battery Must Be Recycled Or Disposed Of Properly." 42 U.S.C. 14322(b). Batteries labeled in accordance with this federal statute are deemed to be in compliance with these guides.

qualified to disclose the limited availability of recycling programs for the container. If the SPI code, without more, had been placed in an inconspicuous location on the container (e.g., embedded in the bottom of the container) it would not constitute a claim of recyclability.

Example 3: A container can be burned in incinerator facilities to produce heat and power. It cannot, however, be recycled into another product or package. Any claim that the container is recyclable would be deceptive.

Example 4: A nationally marketed bottle bears the unqualified statement that it is "recyclable." Collection sites for recycling the material in question are not available to a substantial majority of consumers or communities, although collection sites are established in a significant percentage of communities or available to a significant percentage of the population. The unqualified claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs may conclude that recycling programs for the material are available in their area. To avoid deception, the claim should be qualified to indicate the limited availability of programs, for example, by stating "This bottle may not be recyclable in your area," or "Recycling programs for this bottle may not exist in your area." Other examples of adequate qualifications of the claim include providing the approximate percentage of communities or the population to whom programs are available.

Example 5: A paperboard package is marketed nationally and labeled, "Recyclable where facilities exist." Recycling programs for this package are available in a significant percentage of communities or to a significant percentage of the population, but are not available to a substantial majority of consumers. The claim is deceptive because, unless evidence shows otherwise, reasonable consumers living in communities not served by programs that recycle paperboard packaging may understand this phrase to mean that such

programs are available in their area. To avoid deception, the claim should be further qualified to indicate the limited availability of programs, for example, by using any of the approaches set forth in Example 4 above.

Example 6: A foam polystyrene cup is marketed as follows: "Recyclable in the few communities with facilities for foam polystyrene cups." Collection sites for recycling the cup have been established in a half-dozen major metropolitan areas. This disclosure illustrates one approach to qualifying a claim adequately to prevent deception about the limited availability of recycling programs where collection facilities are not established in a significant percentage of communities or available to a significant percentage of the population. Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 7: A label claims that the package "includes some recyclable material." The package is composed of four layers of different materials, bonded together. One of the layers is made from the recyclable material, but the others are not. While programs for recycling this type of material are available to a substantial majority of consumers, only a few of those programs have the capability to separate the recyclable layer from the non-recyclable layers. Even though it is technologically possible to separate the layers, the claim is not adequately qualified to avoid consumer deception. An appropriately qualified claim would be, "includes material recyclable in the few communities that collect multi-layer products." Other examples of adequate qualification of the claim include providing the number of communities with programs, or the percentage of communities or the population to which programs are available.

Example 8: A product is marketed as having a "recyclable" container. The product is distributed and advertised only in

Missouri. Collection sites for recycling the container are available to a substantial majority of Missouri residents, but are not yet available nationally. Because programs are generally available where the product is marketed, the unqualified claim does not deceive consumers about the limited availability of recycling programs.

Example 9: A manufacturer of one-time use photographic cameras, with dealers in a substantial majority of communities, collects those cameras through all of its dealers. After the exposed film is removed for processing, the manufacturer reconditions the cameras for resale and labels them as follows: "Recyclable through our dealership network." This claim is not deceptive, even though the cameras are not recyclable through conventional curbside or drop off recycling programs.

Example 10: A manufacturer of toner cartridges for laser printers has established a recycling program to recover its cartridges exclusively through its nationwide dealership network. The company advertises its cartridges nationally as "Recyclable. Contact your local dealer for details." The company's dealers participating in the recovery program are located in a significant number—but not a substantial majority—of communities. The "recyclable" claim is deceptive unless it contains one of the qualifiers set forth in Example 4. If participating dealers are located in only a few communities, the claim should be qualified as indicated in Example 6.

Example 11: An aluminum beverage can bears the statement "Please Recycle." This statement is likely to convey to consumers that the package is recyclable. Because collection sites for recycling aluminum beverage cans are available to a substantial majority of consumers or communities, the claim does not need to be qualified to indicate the limited availability of recycling programs.

(e) Recycled content.

(1) A recycled content claim may be made only for materials that have been recovered or otherwise diverted from the solid waste stream, either during the manufacturing process (pre-consumer), or after consumer use (post-consumer). To the extent the source of recycled content includes pre-consumer material, the manufacturer or advertiser must have substantiation for concluding that the pre-consumer material would otherwise have entered the solid waste stream. In asserting a recycled content claim, distinctions may be made between pre-consumer and post-consumer materials. Where such distinctions are asserted, any express or implied claim about the specific pre-consumer or post-consumer content of a product or package must be substantiated.

(2) It is deceptive to misrepresent, directly or by implication, that a product or package is made of recycled material, which includes recycled raw material, as well as used,[5] reconditioned and remanufactured components. Unqualified claims of recycled content may be made if the entire product or package, excluding minor, incidental components, is made from recycled material. For products or packages that are only partially made of recycled material, a recycled claim should be adequately qualified to avoid consumer deception about the amount, by weight, of recycled content in the finished product or package. Additionally, for products that contain used, reconditioned or remanufactured components, a recycled claim should be adequately qualified to avoid consumer deception about the nature of such components. No such qualification would be necessary in cases where it would be clear to consumers

[5] The term "used" refers to parts that are not new and that have not undergone any type of remanufacturing and/or reconditioning.

from the context that a product's recycled content consists of used, reconditioned or remanufactured components.

Example 1: A manufacturer routinely collects spilled raw material and scraps left over from the original manufacturing process. After a minimal amount of reprocessing, the manufacturer combines the spills and scraps with virgin material for use in further production of the same product. A claim that the product contains recycled material is deceptive since the spills and scraps to which the claim refers are normally reused by industry within the original manufacturing process, and would not normally have entered the waste stream.

Example 2: A manufacturer purchases material from a firm that collects discarded material from other manufacturers and resells it. All of the material was diverted from the solid waste stream and is not normally reused by industry within the original manufacturing process. The manufacturer includes the weight of this material in its calculations of the recycled content of its products. A claim of recycled content based on this calculation is not deceptive because, absent the purchase and reuse of this material, it would have entered the waste stream.

Example 3: A greeting card is composed 30% by fiber weight of paper collected from consumers after use of a paper product, and 20% by fiber weight of paper that was generated after completion of the paper-making process, diverted from the solid waste stream, and otherwise would not normally have been reused in the original manufacturing process. The marketer of the card may claim either that the product "contains 50% recycled fiber," or may identify the specific pre-consumer and/or post-consumer content by stating, for example, that the product "contains 50% total recycled fiber, including 30% post-consumer."

Example 4: A paperboard package with 20% recycled fiber by weight is labeled as containing "20% recycled fiber." Some of the recycled content was composed of material collected from consumers after use of the original product. The rest was composed of overrun newspaper stock never sold to customers. The claim is not deceptive.

Example 5: A product in a multi-component package, such as a paperboard box in a shrink-wrapped plastic cover, indicates that it has recycled packaging. The paperboard box is made entirely of recycled material, but the plastic cover is not. The claim is deceptive since, without qualification, it suggests that both components are recycled. A claim limited to the paperboard box would not be deceptive.

Example 6: A package is made from layers of foil, plastic, and paper laminated together, although the layers are indistinguishable to consumers. The label claims that "one of the three layers of this package is made of recycled plastic." The plastic layer is made entirely of recycled plastic. The claim is not deceptive provided the recycled plastic layer constitutes a significant component of the entire package.

Example 7: A paper product is labeled as containing "100% recycled fiber." The claim is not deceptive if the advertiser can substantiate the conclusion that 100% by weight of the fiber in the finished product is recycled.

Example 8: A frozen dinner is marketed in a package composed of a cardboard box over a plastic tray. The package bears the legend, "package made from 30% recycled material." Each packaging component amounts to one-half the weight of the total package. The box is 20% recycled content by weight, while the plastic tray is 40% recycled content by weight. The claim is not deceptive, since the average amount of recycled material is 30%.

Example 9: A paper greeting card is labeled as containing 50% recycled fiber. The seller purchases paper stock from

several sources and the amount of recycled fiber in the stock provided by each source varies. Because the 50% figure is based on the annual weighted average of recycled material purchased from the sources after accounting for fiber loss during the production process, the claim is permissible.

Example 10: A packaged food product is labeled with a three-chasing-arrows symbol without any further explanatory text as to its meaning. By itself, the symbol is likely to convey that the packaging is both "recyclable" and is made entirely from recycled material. Unless both messages can be substantiated, the claim should be qualified as to whether it refers to the package's recyclability and/or its recycled content. If a "recyclable" claim is being made, the label may need to disclose the limited availability of recycling programs for the package. If a recycled content claim is being made and the packaging is not made entirely from recycled material, the label should disclose the percentage of recycled content.

Example 11: A laser printer toner cartridge containing 25% recycled raw materials and 40% reconditioned parts is labeled "65% recycled content; 40% from reconditioned parts." This claim is not deceptive.

Example 12: A store sells both new and used sporting goods. One of the items for sale in the store is a baseball helmet that, although used, is no different in appearance than a brand new item. The helmet bears an unqualified "Recycled" label. This claim is deceptive because, unless evidence shows otherwise, consumers could reasonably believe that the helmet is made of recycled raw materials, when it is in fact a used item. An acceptable claim would bear a disclosure clearly stating that the helmet is used.

Example 13: A manufacturer of home electronics labels its video cassette recorders ("VCRs") as "40% recycled." In fact, each VCR contains 40% reconditioned parts. This claim is

deceptive because consumers are unlikely to know that the VCR's recycled content consists of reconditioned parts.

Example 14: A dealer of used automotive parts recovers a serviceable engine from a vehicle that has been totaled. Without repairing, rebuilding, remanufacturing, or in any way altering the engine or its components, the dealer attaches a "Recycled" label to the engine, and offers it for resale in its used auto parts store. In this situation, an unqualified recycled content claim is not likely to be deceptive because consumers are likely to understand that the engine is used and has not undergone any rebuilding.

Example 15: An automobile parts dealer purchases a transmission that has been recovered from a junked vehicle. Eighty-five percent by weight of the transmission was rebuilt and 15% constitutes new materials. After rebuilding[6] the transmission in accordance with industry practices, the dealer packages it for resale in a box labeled "Rebuilt Transmission," or "Rebuilt Transmission (85% recycled con-tent from rebuilt parts)," or "Recycled Transmission (85% recycled content from rebuilt parts)." These claims are not likely to be deceptive.

(f) Source reduction: It is deceptive to misrepresent, directly or by implication, that a product or package has been reduced or is lower in weight, volume or toxicity. Source reduction claims should be qualified to the extent necessary to avoid consumer deception about the amount of the source reduction and about the basis for any comparison asserted.

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[6] The term "rebuilding" means that the dealer dismantled and reconstructed the transmission as necessary, cleaned all of its internal and external parts and eliminated rust and corrosion, restored all impaired, defective or substantially worn parts to a sound condition (or replaced them if necessary), and performed any operations required to put the transmission in sound working condition.

Example 1: An ad claims that solid waste created by disposal. Immediately preceding product or to a competitor's product. The "10% less waste" reference is deceptive unless the seller clarifies which comparison is intended and substantiates that comparison, or substantiates both possible interpretations of the claim.

(g) Refillable: It is deceptive to misrepresent, directly or by implication, that a package is refillable. An unqualified refillable claim should not be asserted unless a system is provided for the collection and return of the package for refill or the later refill of the package by consumers with product subsequently sold in another package. A package should not be marketed with an unqualified refillable claim, if it is up to the consumer to find new ways to refill the package.

Example 1: A container is labeled "refillable x times." The manufacturer has the capability to refill returned containers and can show that the container will withstand being refilled at least x times. The manufacturer, however, has established no collection program. The unqualified claim is deceptive because there is no means for collection and return of the container to the manufacturer for refill.

Example 2: A bottle of fabric softener states that it is in a "handy refillable container." The manufacturer also sells a large-sized container that indicates that the consumer is expected to use it to refill the smaller container. The manufacturer sells the large-sized container in the same market areas where it sells the small container. The claim is not deceptive because there is a means for consumers to refill the smaller container from larger containers of the same product.

(h) Ozone safe and ozone friendly: It is deceptive to misrepresent, directly or by implication, that a product is safe for or "friendly" to the ozone layer or the atmosphere. For example, a claim that a product does not harm the ozone layer

is deceptive if the product contains an ozone-depleting substance.

Example 1: A product is labeled "ozone friendly." The claim is deceptive if the product contains any ozone-depleting substance, including those substances listed as Class I or Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Public Law 101-549, and others subsequently designated by EPA as ozone-depleting substances. Chemicals that have been listed or designated as Class I are chlorofluorocarbons (CFCs), halons, carbon tetrachloride, 1,1,1-trichloroethane, methyl bromide and hydrobromofluorocarbons (HBFCs). Chemicals that have been listed as Class II are hydrochlorofluorocarbons (HCFCs).

Example 2: An aerosol air freshener is labeled "ozone friendly." Some of the product's ingredients are volatile organic compounds (VOCs) that may cause smog by contributing to ground-level ozone formation. The claim is likely to convey to consumers that the product is safe for the atmosphere as a whole, and is therefore, deceptive.

Example 3: The seller of an aerosol product makes an unqualified claim that its product "Contains no CFCs." Although the product does not contain CFCs, it does contain HCFC-22, another ozone depleting ingredient. Because the claim "Contains no CFCs" may imply to reasonable consumers that the product does not harm the ozone layer, the claim is deceptive.

Example 4: A product is labeled "This product is 95% less damaging to the ozone layer than past formulations that contained CFCs." The manufacturer has substituted HCFCs for CFC-12, and can substantiate that this substitution will result in 95% less ozone depletion. The qualified comparative claim is not likely to be deceptive.

Sec. 260.8 Environmental assessment.

(a) National Environmental Policy Act. In accordance with section 1.83 of the FTC's Procedures and Rules of Practice[7] and section 1501.3 of the Council on Environmental Quality's regulations for implementing the procedural provisions of National Environmental Policy Act, 42 U.S.C. 4321 et seq. (1969),[8] the Commission prepared an environmental assessment when the guides were issued in July 1992 for purposes of providing sufficient evidence and analysis to determine whether issuing the Guides for the Use of Environmental Marketing Claims required preparation of an environmental impact statement or a finding of no significant impact. After careful study, the Commission concluded that issuance of the Guides would not have a significant impact on the environment and that any such impact "would be so uncertain that environmental analysis would be based on speculation."[9] The Commission concluded that an environmental impact statement was therefore not required. The Commission based its conclusions on the findings in the environmental assessment that issuance of the guides would have no quantifiable environmental impact because the guides are voluntary in nature, do not preempt inconsistent state laws, are based on the FTC's deception policy, and, when used in conjunction with the Commission's policy of case-by-case enforcement, are intended to aid compliance with section 5(a) of the FTC Act as that Act applies to environmental marketing claims.

(b) The Commission has concluded that the modifications to the guides in this part will not have a significant effect on the environment, for the same reasons that the issuance of the original guides in 1992 and the modifications to the guides in 1996 were deemed not to have a significant effect on the

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[7] 16 CFR 1.83.
[8] 40 CFR 1501.3.
[9] 16 CFR 1.83(a).

environment. Therefore, the Commission concludes that an environmental impact statement is not required in conjunction with the issuance of the 1998 modifications to the Guides for the Use of Environmental Marketing Claims.

California Business and Professions Code § 17200

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

California Business and Professions Code § 17201

As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

California Business and Professions Code § 17201.5

As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes an commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

California Business and Professions Code § 17202

Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may ranted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

California Business and Professions Code § 17203

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

California Business and Professions Code § 17204

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17204.5

In addition to the persons authorized to bring an action pursuant to Section 17204, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute such actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as deter-

mined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

California Business and Professions Code § 17205

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

California Business and Professions Code § 17206

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in the in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the

county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment was entered. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court

supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

California Business and Professions Code § 17206.1

(a) In addition to any liability for a civil penalty pursuant to Section 17206, any person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation which may be assessed and recovered in a civil action as prescribed in Section 17206. Subject to subdivision (d), any civil penalty shall be paid as prescribed by subdivisions (b) and (c) of Section 17206.

(b) As used in this section, the following terms have the following meanings:

(1) "Senior citizen" means a person who is 65 years of age or older.

(2) "Disabled person" means any person who has a physical or mental impairment which substantially limits one or more major life activities.

(A) As used in this subdivision, "physical or mental impairment" means any of the following: (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine. (ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment"

includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(B) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) In determining whether to impose a civil penalty pursuant to subdivision (a) and the amount thereof, the court shall consider, in addition to any other appropriate factors, the extent to which one or more of the following factors are present:

(1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

(2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

(3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

(d) Any court of competent jurisdiction hearing an action pursuant to this section may make orders and judgments as may be necessary to restore to any senior citizen or disabled person any money or property, real or personal, which may have been acquired by means of a violation of this chapter. Restitution ordered pursuant to this subdivision shall be given priority over recovery of any civil penalty designated by the court as imposed pursuant to subdivision (a), but shall not be given priority over any civil penalty imposed pursuant to subdivision (a) of Section 17206. If the court determines that full restitution cannot be made to those senior citizens or disabled persons, either at the time of judgment or by a future date determined by the court, then restitution under this subdivision shall be made on a pro rata basis depending on the amount of loss.

California Business and Professions Code § 17206.5

In addition to the persons authorized to bring an action pursuant to Section 17206, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

California Business and Professions Code § 17207

(a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was

issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable

expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

California Business and Professions Code § 17208

Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

California Business and Professions Code § 17209

If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

California Business and Professions Code § 17500

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made

or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that imprisonment and fine.

California Business and Professions Code § 17506

As used in this chapter, "person" includes any individual, partnership, firm, association, or corporation.

California Business and Professions Code § 17506.5

As used in this chapter:

(a) "Board within the Department of Consumer Affairs" includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) "Local consumer affairs agency" means and includes any city or county body which primarily provides consumer protection services.

California Business and Professions Code § 17522

No goods or articles which are determined by label, symbol, trade name, or name of the manufacturer to indicate that they are made by blind workers shall be delivered or offered by any person, partnership, firm, corporation, institution, or association, for sale in this state unless at least 75 percent of the total hours of direct labor of producing such goods or articles purported to be made by the blind shall have been performed by the blind. No goods or articles which do not have a label, symbol, or other printed matter indicating that at least 75 percent of the total hours of direct labor of producing such goods or articles were made by the blind, as herein defined, shall be offered for sale directly or indirectly as being made by the blind unless such goods or articles were in fact so made by the blind as herein defined.

Any violation of this section is a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000) or imprisonment in the county jail for not more than one year, or by both the fine and imprisonment, and any such violation or threatened violation shall be actionable under Section 17535 of this chapter.

California Business and Professions Code § 17533.7

It is unlawful for any person, firm, corporation or association to sell or offer for sale in this State any merchandise on which merchandise or on its container there appears the words "Made in U.S.A." "Made in America," "U.S.A.," or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

California Business and Professions Code § 17534

Any person, firm, corporation, partnership or association or any employee or agent thereof who violates this chapter is guilty of a misdemeanor.

California Business and Professions Code § 17534.5

Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

California Business and Professions Code § 17535

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

California Business and Professions Code § 17535.5

(a) Any person who intentionally violates any injunction issued pursuant to Section 17535 shall be liable for a civil penalty not to exceed six thousand dollars ($6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of such conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances,

including, but not limited to, the extent of harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction within his jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover such civil penalties shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

California Business and Professions Code § 17536

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-

half of the penalty shall be paid to the treasurer of the county and one-half to the city.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

California Business and Professions Code § 17536.5

If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, the person who commenced that proceeding shall serve notice thereof, including a copy of the person's brief or petition and brief, on the Attorney General, directed to the attention of the Consumer Law Section, and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, including the brief or petition and brief, shall be served within three days after the commencement of the appellate proceeding, provided that the time may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or

permanent, shall be granted until proof of service of this notice is filed with the court.

California Business and Professions Code § 17569

It is unlawful to barter, trade, sell, or offer for sale or trade, any article represented as made by authentic American Indian labor or workmanship, unless the basic article was produced wholly by American Indian labor or workmanship.

Any article bearing a trademark or label registered by Indian persons, groups, bands, tribes, pueblos, or communities with the Indian Arts and Crafts Board in Washington, D.C., or with the American Indian Historical Society, Incorporated, in San Francisco, California, shall be presumed to be authentic.

Only those articles bearing a registered trademark or label of authentic Indian labor or workmanship may be deemed an art or craft of authentic Indian labor or workmanship.

California Business and Professions Code § 17580.5

(a) It is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claim, whether explicit or implied. For the purpose of this section, "environmental marketing claim" shall include any claim contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

(b) It shall be a defense to any suit or complaint brought under this section that the person's environmental marketing claims conform to the standards or are consistent with the examples contained in the "Guides for the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

California Civil Code § 1770(a)

The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(4) Using deceptive representations or designations of geographic origin in connection with goods or services.

California Code of Civil Procedure § 128.7

(a) Every pleading, petition, written notice of motion, or other similar paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise provided by law, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) By presenting to the court, whether by signing, filing, submitting, or later advocating, a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

(1) It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation. In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence.

(1) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(2) On its own motion, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b),

unless, within 21 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected.

(d) A sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated. Subject to the limitations in paragraphs (1) and (2), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(1) Monetary sanctions may not be awarded against a represented party for a violation of paragraph (2) of subdivision (b).

(2) Monetary sanctions may not be awarded on the court's motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(e) When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this section and explain the basis for the sanction imposed.

(f) In addition to any award pursuant to this section for conduct described in subdivision (b), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the

plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(g) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.

(h) A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanctions authority to deter that improper conduct or comparable conduct by others similarly situated.

(i) This section shall apply to a complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter.

(j) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2006, deletes or extends that date.

California Code of Civil Procedure § 425.16

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the

court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in

furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order

granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

California Code of Civil Procedure § 452

In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties.

California Code of Civil Procedure § 472

Any pleading may be amended once by the party of course, and without costs, at any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended and serving a copy on the adverse party, and the time in which the adverse party must respond thereto shall be computed from the date of notice of the amendment.

California Code of Civil Procedure § 472c(a)

When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made.

California Code of Civil Procedure § 1021.5

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if:

(a) a significant benefit, whether pecuniary or nonpecuniary,

has been conferred on the general public or a large class of persons,

(b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and

(c) such fees should not in the interest of justice be paid out of the recovery, if any.

With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with Section 900) of Division 3.6 of Title 1 of the Government Code.

Attorneys' fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v. Priest*, 20 Cal.3d 25, 49.

California Labor Code § 1012

Any person engaged in the production, manufacture, or sale of any article of merchandise in this state, or any person engaged in the performance of any acts or services of a private, public, or quasi-public nature for profit, who willfully misrepresents or falsely states that members of trades unions, labor associations, or labor organizations were engaged or employed in the manufacture, production, or sale of such article or in the performance of such acts or services, is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than 90 days, or both.

Supreme Court, U.S.
FILED
APR 16 2003
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Writ of Certiorari
to the Supreme Court of California

REPLY BRIEF FOR THE PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR THE PETITIONERS[1]

Respondent Kasky offers no persuasive answer to the showing of petitioners Nike et al. (collectively, "petitioner" or "Nike") that the California Supreme Court's ruling must be reversed because it both (a) conflicts with this Court's precedents delimiting the category of "commercial speech" that receives lessened protection under the First Amendment, and in any event (b) approves a legal regime that gravely threatens fully protected speech. Before addressing those points, however, it bears emphasizing at the outset that Kasky's *amici* mischaracterize his complaint as alleging that Nike misled consumers into purchasing its products through reckless or purposeful falsehoods (*e.g.*, Cal. Br. 1), such that Nike must be claiming a First Amendment privilege "to lie" (*e.g.*, Sierra Club Br. 9) in order to sell its athletic apparel. In reality, Kasky does not allege that any California resident in fact relied on any false statement by Nike in purchasing its products but alleges only that those statements were misleading (even if not false) and were at most negligent. See Pet. Open. Br. 6, 12.[2]

This case accordingly raises no issue regarding the power of government to prosecute those who use deliberate deception to extract money from the public (see, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940); *Schneider* v. *State*, 308 U.S. 147, 164 (1939)); or to obtain civil injunctions against those who would "perpetrat[e] * * * swindling schemes" (*Donaldson* v. *Read Magazine*, 333 U.S. 178, 191 (1948)); or to provide a remedy for consumers who can prove that a seller's misrepresentations fraudulently induced them to purchase its

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[1] The State of California's allegation (Br. 19-20) that petitioner failed to include the certification required by 28 U.S.C. 2403(b) is flatly wrong. See App., *infra*.

[2] Kasky's *amici* cite the complaint's single suggestion that Nike committed a reckless omission in one type of statement (¶ 30); but Kasky not only abandoned that allegation in both the state appellate courts and this Court (see Pet. Open. Br. 6 n.1; Kasky Br. 17 (alleging only negligence)), he now disavows *all* allegations of liability by omission (Br. 28 n.7).

products. When the traditional elements of such a claim are alleged and proven – including, importantly, proof that the representations were knowingly or recklessly false, that the plaintiff reasonably relied on them, and that the plaintiff was injured – government's power to regulate the formation of contracts and to protect those who rely to their detriment on the promises of others (cf. *Cohen* v. *Cowles Media*, 501 U.S. 663, 669-71 (1991)), by providing remedies ranging from rescission and restitution to damages, presents no insuperable First Amendment problem. See *Bose Corp.* v. *Consumers Union of the United States*, 466 U.S. 485, 502 & n.19 (1984) (observing "kinship" between standard of liability under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and "motivation that must be proved to support a common-law action for deceit").

It also bears noting at the outset that Kasky's overarching contention that Nike's statements share *some* of the qualities of traditional commercial speech – principally, that Nike knew consumers would rely on its representations in making purchasing decisions (*e.g.*, Kasky Br. 6) – misses its mark, proving only how essential it is for this Court to decide both of the questions on which certiorari was granted. As Justice Brown stressed in her dissent below (Pet. App. 41a-42a, 61a), a ruling by this Court merely labeling petitioner's speech "commercial" or "noncommercial" would provide very little guidance. Whether or not this speech is deemed "commercial," it makes the kind of contribution to public discourse that precludes relegating it to reduced protection under the First Amendment.

Although the fact that this case obviously does not involve *pure* commercial speech is sufficient to require reversing the judgment below (see *infra* Pt. II), neither precedent nor common sense suggests that *all* government regulation is impermissible with respect to speech by manufacturers on ethical issues that affect consumer purchasing. Much depends on context and the contribution made by the type of speech involved to the exchange of information and ideas. That point is illustrated by this Court's jurisprudence applying differential protections to defamation defendants depending on the context in which they spoke despite the state's consistent interest in preserving

individual reputation (*e.g.*, *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749, 757-62 (1985) (plurality); *id.* at 764 (Burger, C.J., concurring); *id.* at 774 (White, J., concurring)), and applying varying degrees of scrutiny to government's regulation of distinct forms of "solicitation" despite the state's consistent interest in avoiding fraud (*e.g.*, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. REV. 1, 15-20 (2000)).

In petitioner's view, the elements a public figure must satisfy in suing for defamation or trade libel – including principally that the defendant be shown to have been reckless or worse, that the plaintiff prove injury, and that the speech be proven false as opposed to merely misleading – strike the proper balance between protecting consumers and facilitating free speech. (Indeed, the state interests furthered by the Unfair Competition Law (UCL) and False Advertising Law (FAL) pale in comparison to the interests in personal reputation at issue in defamation cases because these statutes award recovery to persons who have not even been injured.) But whether or not petitioner is right on that score, it is essential that the Court provide guidance by deciding both of the questions presented, lest its ruling merely invite an onslaught of follow-on litigation that rests on allegations barely more substantial than Kasky's.[3]

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[3] By contrast, merely invalidating the power of any state resident to bring a private attorney general lawsuit would leave unaffected all of the remaining facets of the UCL and FAL that pose a grave and lopsided threat to free speech and thus would hardly alleviate the fear of speakers that equally burdensome lawsuits would later be filed by public agencies or by private parties who allege that they have read Nike's statements, even if they cannot establish that petitioner caused any injury or was guilty of deliberate or reckless falsehood. As the Solicitor General has explained, the requirement that the plaintiff prove recklessness is the "most significant" of the ways in which the common law of fraud "provide[s] sufficient breathing room for protected expression." Br. for the U.S., *Madigan* v. *Telemarketing Assocs.*, No. 01-1806, at 10, 13.

I. This Court Has Jurisdiction.

Respondent's assertion that Article III and 28 U.S.C. 1257 deprive this Court of jurisdiction is meritless.

1. Although a literal "final judgment" has not been entered adverse to Nike, this Court has jurisdiction under 28 U.S.C. 1257 so long as (i) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (ii) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). Kasky makes the novel argument that a reversal would not be preclusive here because, if this Court were to hold that the *only* constitutional flaw in California law is that it imposes strict liability (Br. 16 (emphasis added)), then he would be entitled hypothetically to amend his complaint to delete that theory. Even ignoring Kasky's concession below that "Nike wins this appeal" if its statements are not "commercial speech" (Cal. S. Ct. Reply Br. 1) and his abandonment of the claimed right to amend (see Pet. Open. Br. 14), he makes no contention that he *could* in fact amend his complaint to allege that Nike spoke recklessly or that any person detrimentally relied on Nike's statements (Kasky Br. 17). And, even if such allegations were added, California's statutory scheme would not require *proof* either of reckless or deliberate falsehood or of actual injury.

Kasky also makes no substantial argument regarding the erosion of "federal policy" that a refusal to review this case immediately would entail: Not only has "[a]djudicating the proper scope of First Amendment protections * * * often been recognized by this Court as a 'federal policy' that merits application of this exception to the general finality rule" (*Fort Wayne Books* v. *Indiana*, 489 U.S. 46, 55 (1989)), but that interest is heightened when, as in this case, the state court's judgment applies extraterritorially to threaten the exercise of federal rights in other states (*Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988)). Because the decision below "restricts the present exercise of First Amendment rights," "it would be intolerable to leave unanswered * * * [the] important question[s] [it poses] * * * under the First Amendment." *Miami*

Herald Pub. Co. v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). The chilling effect of the ruling below on speech (see *infra* Pt. III) dwarfs that presented by the cases this Court has previously reviewed pursuant to the fourth *Cox* category, each of which involved a statute addressed to a discrete subject (such as a right of reply in *Tornillo*) in a single state. See Cert. Reply 4-7.

2. Kasky alternatively argues that this Court is without Article III jurisdiction because he lacks federal constitutional standing and because the decision below does not direct the trial court to enter a "judgment." Br. 14-16. To be sure, when a party invokes the authority of a federal court – not only when this Court reviews a state court ruling in a private attorney general action (as in this case and *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605 (1989)), but *whenever* a defendant takes a federal appeal – Article III's requirements "must be met by [those] seeking appellate review, just as [they] must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). Conversely, however, if the petitioners in this Court *do* "meet the requirements for federal standing" and "an actual case or controversy is before the Court, there is *no* jurisdictional bar to review." *ASARCO*, 490 U.S. at 624 (emphasis added). See also *id.* at 619 (*petitioner* must satisfy "the constitutional standing requirements"). Those conditions obtain here, for petitioner Nike indisputably does "meet the requirements for federal standing." *Id.* at 624. See also ExxonMobil Br. at 21-24. Indeed, it is only the *Rooker-Feldman* doctrine, not Article III (see 490 U.S. at 622-24), that prevents Nike from suing in federal court for a declaration that the application of the FAL and UCL to its past and contemplated speech, such as in Kasky's suit, violates the First Amendment. See, *e.g.*, *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Steffel* v. *Thompson*, 415 U.S. 452, 458-59 (1974); see also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502-07 (1985); *United States* v. *Grace*, 461 U.S. 171, 175 (1983).

Kasky similarly misunderstands the import of *ASARCO* – and advances a position whose acceptance would cast all interlocutory federal appeals by defendants into doubt under

Article III – when he argues that the decision below "produced a 'judgment' * * * * in [too] limited [a] sense" to support this Court's Article III jurisdiction to review that decision (Br. 15). Kasky fastens on the fact that the Arizona Supreme Court's remand order in *ASARCO* had "instructed the trial court to 'enter summary judgment for respondent'" invalidating a state law (*id.* (quoting 490 U.S. at 610)), but ignores the more salient fact that that "judgment" provided *no relief against the private defendants-petitioners*, leaving open *what* "*relief, if any, might be appropriate*" against them (490 U.S. at 610 (emphasis added)). See *Kadish* v. *Arizona State Land Dep't*, 747 P.2d 1183, 1197 (1987) ("It is not possible to tell on this record just what further relief is appropriate."). This Court took note of the summary judgment awarded against the state land department only because that judgment indicated that the petitioners faced a sufficiently imminent prospect of injury through the *threatened* invalidation of mineral leases issued to them under the statute that judgment invalidated (490 U.S. at 618-21), a prospect considerably more contingent and remote than the certain injury Nike confronts from having to defend its speech in the litigation unleashed by the ruling below. Cf. *City of Houston* v. *Hill*, 482 U.S. 451, 469 n.7 (1987) (prior application of statute to plaintiff's conduct confirms "genuine threat of enforcement" warranting pre-enforcement facial challenge).

II. The Decision Below Cannot Be Reconciled With This Court's Precedents Cabining The Category Of "Commercial Speech."

1. Petitioner's opening brief demonstrated that the category of "commercial speech" is "linked inextricably" (*Friedman* v. *Rogers*, 440 U.S. 1, 10 n.9 (1979)) to the state's power over commerce and thus encompasses product advertising, product labels, and other statements touting the attributes of a product whose sale the speaker is promoting, such as its price, how it performs, or where it may be purchased. See Pet. Open. Br. Pt. I-B. The doctrine confers intermediate First Amendment protection to balance the state's traditional authority over the terms of commercial transactions with the interest of listeners in

receiving information about available products. The balance is struck in a way that permits government to police the truth of what sellers tell consumers not because such "commercial speech" has less value (see *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418-23, 428 (1993)) but because advertising and labeling are uniquely able to mislead consumers through on-the-spot, if not invariably impulsive, "uninformed acquiescence" (*Edenfield* v. *Fane*, 507 U.S. 761, 775 (1993)), inasmuch as they (i) afford little opportunity for "considered reflection" (*Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring)); (ii) naturally invite greater and more reasonable reliance than do equally self-interested assertions by purveyors of goods in the media and in press releases; and (iii) ordinarily are conveyed, as, in effect, part of an offer to potential customers, rather than as an integral part of public discussion, analysis, or debate. Such speech involves not dialogue but "one-way communication: the seller speaks to potential consumers" (Pfizer Br. 22) in much the way that an offer, including the offer of a warranty, "speaks" to them.

a. Kasky's arguments and those of his *amici* only demonstrate why the decision below cannot be reconciled with these foundations of the commercial speech doctrine. The essence of their case for reduced First Amendment protection is that Nike knew some consumers would be influenced by its statements in their purchasing choices. But that rationale is simultaneously grossly overinclusive (because California law imposes liability for statements on which consumers do *not* rely) and underinclusive (because it excludes accusations calculated to *discourage* consumers from purchasing a particular manufacturer's products, and it applies only to statements of fact, even though a company's statements of opinion and its political views influence consumer choices as well). California's determination to police speech affecting its consumers' ethical conclusions regarding those whom they patronize is untethered from the traditional power to regulate commercial dealings: although a purchasing decision that reflects an ethical assessment of the seller based on the seller's speech results in "commerce," what such speech *induces* is, in

essence, *further speech* by the consumer about the entities with which he or she wishes to associate and the activities of which he or she wishes to signal approval or disapproval – a "speech act" akin to a public protest or letter writing campaign.

If it were the state's role to assure that listeners reach the decisions it regards as best informed, in commerce or elsewhere, lessened First Amendment protection would necessarily apply to speech intended to encourage consumers to boycott merchants who discriminate against employees or customers on account of race (but see *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982)), as well as to speech capable of influencing vital political choices, such as "who runs the country, what laws are adopted, [or] whether the country goes to war" (CIF Br. 13). See ACLU Br. 6. Nor does Kasky take account of how the "one-way communication" rationale for state regulation of commercial speech collapses when applied to speech of the sort at issue here: "when a business practice becomes a matter of public concern, the media scrutinize corporate speech and typically place potentially misleading statements into context, thereby providing timely and corrective information. That, in fact, is exactly what happened in this case." Media Br. 2-3. It is "paternalistic to assume that consumers lack the ability or sophistication to decide for themselves whether a company's image reflects reality, or whether that image should influence their purchasing decision at all." *Id.* 19.

Kasky's attempt to equate speech such as petitioner's with traditional advertising on the ground that both supposedly address matters of equivalent "public importance" (Br. 41) ignores the fact that only the former is integrally related to public *dialogue* – *viz.*, the critical exchange among competing perspectives that is fundamental to self-governance. "Whatever one thinks of Nike, it is a crucial participant in this continuing debate." Bob Herbert, Editorial, *Let Nike Stay in the Game*, N.Y. TIMES, May 6, 2002, at A21. See generally AFL-CIO Br. It cannot be seriously doubted that the raging debate over labor conditions in Asia is more central to the First Amendment than is a supermarket flyer advertising shoes. In any event, petitioner's speech addresses matters of public import in a

different and deeper sense than mere advertising: the essence of Kasky's suit is that the ethical issues raised by petitioner's speech are so transcendent that consumers will *override* the purchasing choices they would have made on the basis of what traditional product advertising says about the product's price or performance. Certainly, the First Amendment salience of Nike's speech is unaffected by its economic self-interest as a speaker. "From the Stamp Act to the debate over the structure and ratification of the Constitution, many of the most prominent contributors to the founding generation's debates were 'self-interested' commercial actors who addressed matters directly affecting their commercial interests" (Bus. Roundtable Br. 1), a pattern "repeated in major political debates throughout the nation's history" (*id.* 7).

b. Kasky fails even more obviously in his attempt to shoehorn the decision below into the specific definitions of "commercial speech" that this Court has articulated. His contention that speech "proposes a commercial transaction" whenever it seeks "to induce sales transactions" (Br. 38) does not merely minimize the requirement of a "proposal" – the critical element linking the Court's definition to the state's power to regulate commerce – it *eliminates* it *entirely*. A "definition" of commercial speech that looks principally to whether a business seeks through its speech to increase its sales inevitably sweeps in virtually *all* corporate communications. In fact, that is Kasky's only barely veiled premise, for he deems a Nike "production primer" (Compl. Exh. V), web-page (*id.* Exh. U), and press release (*id.* Exh. II) all to be "commercial speech" merely because they could be received by consumers (Br. 35-36), despite the fact that none did anything beyond participate in a public discussion of a matter of wide public importance without inviting anyone to purchase a Nike product.[4]

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[4] Kasky also contends that a letter from Nike to university officials appended to his complaint (Exh. R) is commercial speech because it is a direct communication by the company to potential customers. Br. 35. But this document on its face belies any claim that it was principally, much less exclusively, a direct solicitation of consumers to purchase Nike products, which are nowhere mentioned;

Hardly more defensible is Kasky's invocation of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, which looked to whether the speech "relate[s] solely to the economic interests of the speaker and its audience" (447 U.S. 557, 561 (1980)). To be sure, the statements this Court there deemed to be "commercial speech" discussed the consequences of energy conservation and in that sense sought "to sell a product by appealing to consumers' concern about the environment." Kasky Br. 40. But what made the speech regulated in *Central Hudson* relate "solely" to the parties' "economic interests" was its unmistakeable character as an advertisement that urged consumers to buy the speaker's product. See 447 U.S. at 559 (Commission policy applied only to "promotional [] advertising intended to stimulate the purchase of utility services" and left unregulated "all advertising not clearly intended to promote sales"). Kasky's contrary reading

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instead, it is a response to "attack[s] from the Made in the USA Foundation[] and other labor organizers" intended to further the universities' *academic* mission "*in discussions with faculty and students* who may be equally disturbed by these charges." Pet. Lodging 190 (emphasis added). College campuses were a focal point of the debate over Nike's practices. Moreover, any claim that such private correspondence misled any recipient into purchasing the writer's products can be fully vindicated by a traditional action seeking recission because the sale was induced by fraud. See *infra* Pt. III.

In any event, the university letter is not a ground for sustaining the judgment below because Kasky's complaint alleged only that the letter was misleading by *omission* (¶ 30), a theory he has since explicitly *abandoned* (see Br. 28 n.7). This Court should reject Kasky's repeated efforts to rely on claims that do not appear in the complaint. Although he alleges, *e.g.*, that Nike's opening brief failed to address several of his factual allegations, *none* of those allegations even appears in the relevant paragraphs of his complaint. See Kasky Br. 4 (relying on Exhs. D & Z regarding wage and hour violations not cited at Compl. ¶¶ 30-38); *id.* 5 (relying on Exhs. P & Z regarding meals and health care not cited at Compl. ¶¶ 52-53); *id.* (relying on Exh. D regarding treatment of workers not cited at Compl. ¶¶ 28-29); *id.* (relying on Exhs. Q, V, and Z regarding health and safety conditions not cited at Compl. ¶¶ 39-45).

cannot be reconciled with *Central Hudson*'s companion case – *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530 (1980) (also per Powell, J.) – which held that a utility's pamphlet about the benefits of nuclear power was fully protected speech although it indisputably sought to influence consumer choices. The court below nonetheless affixed the "relates solely" label to statements of fact regarding a commercial entity's operations that are at least as likely to affect the political and moral decisions of the public generally as they are to affect the purchasing decisions of the speaker's customers.

Kasky would similarly eliminate essential elements of the three-part test articulated in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which looked to (a) advertising format and (b) explicit product references, as well as (c) economic motivation. Like the court below, Kasky would collapse the *Bolger* inquiry into just the third element whenever a company speaks about its operations. He thus asserts that it suffices for Nike to have had an "economic motivation," because its statements were in some sense "promotional" and referred to Nike's "product" in the attenuated sense that they discussed the company's operations. Br. 40. That would, of course, eliminate the critical requirement that speech address the characteristics of the product being sold or of the proposed terms of sale: while the pamphlet in *Bolger* addressed an issue of public importance, it did so by touting the performance of the speaker's products (condoms, with respect to which the speaker had cornered the market) in preserving public health by preventing disease. Kasky's reading of *Bolger* furthermore would defy this Court's determination – citing almost identical language in *Central Hudson* – that it is precisely *because* "[a] company has *the full panoply of constitutional protections* available to its *direct comments on public issues*, [that] there is no reason for providing similar constitutional protection when such comments are made *in the context of commercial transactions*." 463 U.S. at 66-67 & n.13, 68 (emphases added).

III. The California Scheme Does Not Resemble Any Other Legal Regime And Impermissibly Chills Protected Speech.

When applied as the California Supreme Court did here to statements that neither refer to a product's characteristics nor appear in product advertisements or labels, the UCL and FAL inevitably chill a great deal of truthful, fully protected speech around the nation, and indeed the world.

1. There is no obstacle to this Court deciding whether – whatever label one attaches to petitioner's statements – the statutory scheme to which the court below would subject those statements comports with the First Amendment. Contra Kasky Br. 14-20. Nike repeatedly "pressed" this argument below. Kasky responded that, because Nike's statements were supposedly "commercial speech," all of petitioner's other First Amendment objections to the statutory scheme fell away:

> Under California's "policy of consumer protection" embodied in sections 17200 and 17500, false commercial speech is prohibited. Thus, if Nike's statements are proven false, *no issues can arise* about "the structure, definitions and remedies" of sections 17200 and 17500 ([Nike] Brf., p. 5); or a need "to narrow [their] application" (*id.*, p. 18); or whether they "provide the precision necessary" (*id.*, p. 43); or how to "construe [them] so as to preserve constitutional validity" (*id.*, p. 44 n.36); or how "to avoid 'chilling' protected expression" (*id.*, p. 45). Sections 17200 and 17500 are simply the state's means of prohibiting Nike's false commercial speech.

Kasky Cal. S. Ct. Reply Br. 7 (emphasis added).

The California Supreme Court, in turn, "passed on" those questions. It did not merely decide that petitioner's speech was "commercial," for it held (a) that statements like petitioner's are subject to the FAL and UCL, and (b) that there was no other First Amendment obstacle to imposing liability under those statutes, agreeing with Kasky that particularized challenges to the UCL and FAL were irrelevant because "commercial speech that is false or misleading receives *no* protection under the First

Amendment, and therefore a law that prohibits only such unprotected speech *cannot violate* constitutional free speech provisions." See Pet. App. 27a (emphases added). The court thus dismissed as unworthy of attention all challenges to the "chilling effect of [the] speech regulation" effected by the UCL and FAL (*id.* 12a) as well as the objection that this regulation would result in viewpoint discrimination by "restrict[ing] or disfavor[ing] expression of one point of view (Nike's) and not the other point of view (that of critics of Nike's practices)" (*id.* 27a), and remanded the case for consideration of Nike's demurrer to the extent that it raised defenses *other* than the First Amendment (*id.* 30a). In these circumstances, for this Court nonetheless *not* to decide the second question on which it has granted certiorari would in essence decide that question adversely to Nike.

In any event, "[o]nce a federal claim is properly presented, a party can make any *argument* in support of that *claim*; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534-35 (1992) (emphases added). Nike obviously preserved the claim that application of the UCL and FAL in this case violates the First Amendment because, among other things, "[t]he threat of litigation under these statutes, [with] the [attendant] risk of erroneous fact-finding," will unduly deter protected speech (Nike Cal. S. Ct. Br. 43-44), a claim that plainly encompasses Nike's argument that the several features of the UCL and FAL, taken separately or in combination, impermissibly chill fully protected expression. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (claim that Amtrak violated First Amendment encompasses argument that Amtrak is state actor); *Yee*, 503 U.S. at 534-35 (claim that ordinance constituted a taking encompassed both physical and regulatory takings arguments).

This case accordingly presents for decision the First Amendment implications of Kasky's statutory right under California law to sue as a private attorney general. The power of literally any state resident, having suffered no injury and possessing no knowledge of the facts, to bring suit under the UCL and FAL contributes significantly to the statutes' chilling

effect. Not only is that argument encompassed both by Nike's First Amendment claim and by its specific contention (rejected by the court below) that the statutes impermissibly chill protected speech, but the court below *specifically reaffirmed* the explicit statutory right, without which Kasky's complaint cannot survive, of "'any person acting for the interests of * * * the general public,' [to] bring an action for relief" under the UCL and FAL. Pet. App. 6a-7a.

2. The UCL and FAL (a) permit any California resident to bring suit while conceding a complete absence of personal knowledge as to whether the allegations made are true; (b) are not tailored to regulate speech on a particular topic about which the speaker can take special steps to assure accuracy (*e.g.*, that its products are "Made in the U.S.A.") but instead encompass every possible factual statement on every issue related to the company's operations; (c) apply to statements made anywhere in the world, including on the Internet, received in California; (d) apply to statements published not by the speaker but by *the press*, over which the speaker has no control; and (e) impose liability (i) without fault or at most on a showing of negligence, (ii) on the basis of "omissions" as well as affirmative assertions, (iii) for mere misleading statements as well as actual falsehoods, and (iv) despite the fact that *no one was injured*.

Kasky and his *amici* inadvertently illustrate the profound chilling effect of the decision below when they embrace its sweeping holding that, because consumers might "care" about virtually *every* aspect of corporate operations – however divorced from the qualities of the products being sold – almost any factual statement a business might make about itself or its contractors is relegated to the lessened First Amendment protection applicable to commercial speech. "The range of legitimate consumer concerns that may motivate buying is vast" (Kucinich Br. 12), ranging from selecting products with a view to "preserving American jobs, supporting union (or other types of) labor, [or] preventing harm to dolphins" (Kasky Br. 33), to "purchas[ing] products from companies that protect the environment, support the symphony or the local high school basketball team, avoid cruelty to animals in product testing,

underwrite tutoring programs for inner-city youth, * * * finance cancer research" (Cal. Br. 14), "donate[] some percentage of [their] profits * * * to charity" (Kucinich Br. 12) or reduce "vehicle emissions [said to] increase global warming" (Public Cit. Br. 22). Depending on the national mood, consumers may care even more about whether a corporation's owners are French and whether its executives support a decision to go to war. *E.g.*, Paul Blustein & Ariana E. Cha, *Product Protesters Face Tough Going*, WASH. POST, Apr. 6, 2003, at A21. By empowering its judges, without any showing of harm or of deliberate or reckless falsehood, to conduct, whenever any California citizen so requests, a roving inquiry into the truth of what companies say about all such matters, armed with wide-ranging discovery and intrusive remedial powers, the court below sucked the air out of the "breathing space" that speech on matters of public concern requires to "survive." *New York Times* v. *Sullivan*, 376 U.S. at 272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)).

The chilling effect of this legal regime (which has no parallel in any other jurisdiction and was unrecognized even in California until this case (see generally Civil Justice Ass'n of Cal. Br. & App.)) would be manifest even if *other* aspects of California law were to ameliorate the speech-inhibiting consequences of the UCL and FAL; but they do not. The state's anti-SLAPP law is no comfort (contra Kasky Br. 23) because it applies only to claims "lack[ing] *even minimal merit*" (*Navellier* v. *Sletten*, 29 Cal. 4th 82, 89 (2002) (emphasis added)), a standard unlikely to deter much litigation, given the plaintiff's paltry burdens of pleading and proof under the UCL and FAL. Kasky's further claim that "the defendant's financial exposure is limited" (Br. 21) is entirely invented, for the exorbitant costs of litigation are themselves a recognized deterrent to speech (*e.g.*, *First Nat'l Bank of Boston* v. *Belotti*, 435 U.S. 765, 785 n.21 (1978)), and are thus an invitation to bring extortive lawsuits (see, *e.g.*, Jonathan D. Glater, *California Says State Law Was Used as Extortion Tool*, N.Y. TIMES, Apr. 5, 2003, at A8).

Anyone whose speech might reach California also must fear that, if a plaintiff does take the case to trial and succeeds on the merits under the meager burdens imposed by state law, the

speaker may be required both to assume the burdens of a corrective speech campaign and also to provide to each of its California customers an amount of restitution that is unknowable *ex ante*, with *amicus* State of California retaining the power also to seek fines. See Pet. Open. Br. 4-5; Cal. Bus. & Prof. Code 17206. Although Kasky suggests that the demand for restitution set out in his own complaint is inoperative because he does not allege that any California consumer detrimentally relied on Nike's statements (Br. 21), California law with respect to restitution remains in a state of uncertainty that will cause risk-averse speakers to steer well clear of the statements that could lead to substantial liability. Thus, although the California Supreme Court decided after petitioner's opening brief was filed in this Court that state law does not authorize "*nonrestitutionary* disgorgement" in individual actions, it did not purport to limit the right to restitution. *Korea Supply Co.* v. *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146-51 (2003) (citing, *inter alia*, *Fletcher* v. *Sec. Pac. Nat'l Bank*, 591 P.2d 51 (Cal. 1979)).

3. Kasky altogether ignores two important respects in which the UCL and FAL as construed below necessarily chill even more than the expression of factual statements to which the decision below applies by its terms. *First*, respondent can offer no persuasive explanation of how Nike could make a genuine contribution to the debate over globalization without addressing the conditions at its own contract factories. Given that the statements of fact regulated by the decision below are "inextricably intertwined" with statements of opinion, the full protections of the First Amendment apply. Pet. Open. Br. 43 (citing *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988)). Because it is all but impossible to offer a meaningful "opinion" without reference to underlying "facts," and because the line between those two categories is inherently ambiguous, the ruling below will necessarily deter much protected expression from the perspective of commercial entities regarding social issues that relate to their business practices. *Id.* 42 (citing *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990)).

Second, prohibited viewpoint discrimination inheres in the reality that, under California law, Nike will be more susceptible

than its critics to liability for any misstatement about its labor practices. Kasky's argument that traditional "false advertising" claims are already subject to a more lenient burden of proof than the "actual malice" standard applicable to product defamation suits (Br. 50) ignores government's longstanding, special role in regulating the unique effects of traditional "advertising" on consumers as part of its regulatory authority over commercial transactions. This case is critically different: it involves allegations and responses that not only appear *in the same protected context* (*e.g.*, newspaper articles, editorials, and press releases) but also have an indistinguishable relationship to consumers' purchasing decisions. California law thus impermissibly discriminates against speakers based on their viewpoint – *i.e.*, depending entirely on whether they seek to encourage or discourage purchases of the same product.

4. Kasky cannot avoid recognition of the inevitable chilling effect and viewpoint tilt of the statutory scheme on which his complaint rests with the generalized assertion that businesses' statements of fact about their own operations are, by and large, "verifiable" and "hearty." Nor is there merit to his related argument that elements of the "actual malice" standard applied in cases such as *New York Times* v. *Sullivan* are inapposite whenever the speech in question concerns the speaker's own operations. The transaction-related statements regarding a product's own characteristics (such as its price and utility) that this Court has previously deemed "commercial speech" are easily verified and need not be published in the marketplace until the speaker has sufficient confidence in their accuracy. See *Rubin*, 514 U.S. at 495 n.4 (Stevens, J., concurring). By contrast, because the legal regime upheld below does not employ a "recklessness" standard, it accounts neither for the wide variation in the ready verifiability of statements regarding business operations, nor for the fact that the speaker may have needed to respond urgently, and without the opportunity for detailed study, to allegations raised by opponents. The allegations in this very case concerned operations at factories around the globe that petitioner *does not own or operate* and that were hotly debated every day in the media. In any event, "easy

verifiability" is not a ground for affording speech watered-down protection under the First Amendment. If it were, statements by unions regarding their practices and by politicians regarding their voting records could give rise to lawsuits seeking damages, reversal of election results, gag orders, and corrective speech campaigns – a prospect strikingly inconsistent with this Court's jurisprudence. Cf. *Republican Party of Minn.* v. *White*, 536 U.S. 765 (2002); *Brown* v. *Hartlage*, 456 U.S. 45 (1982); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Unlike product advertising – "the *sina qua non* of commercial profits" (*Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976)) – statements by businesses regarding social issues are likely to be chilled by the prospect of liability because they often contribute only marginally to the speaker's bottom line. The prospect that the financial risks imposed by the UCL and FAL will inhibit protected speech is magnified by the fact that, unlike regulatory regimes previously considered by this Court, this one – by potentially authorizing wide-ranging restitution as well as corrective speech campaigns – imposes liability *entirely disproportionate* to any financial benefit the statements might have produced.

However careful it tries to be, no company can have confidence in its ability to speak about hotly contested aspects of its operations or its employees' activities in far-flung facilities without inviting a lawsuit by at least *one* dubious or critical resident of California – a lawsuit that will impose on the company the substantial and one-sided costs of defending the litigation – *even if* the company believes that, by enduring years of litigation, it would ultimately secure a trial court's judgment that its statements were absolutely truthful. Although Kasky and his *amici* repeatedly invoke this Court's statement in *Gertz* v. *Robert Welch, Inc.* that "there is no constitutional value in false statements of fact," more apt here is the *Gertz* Court's *conclusion* that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." 418 U.S. 323, 340 (1974). Given "[t]he increasingly widespread dissemination of

corporate speech * * * the law applied in the least protective jurisdiction effectively governs the national, and indeed worldwide, statements of thousands of corporations" (U.S. Chamber Br. 20) and to that degree the ruling below stands "in direct derogation [of] a policy announced and pursued by the European Union and its member nations, and therefore violates notions of international comity" (SRIMedia Br. 11).

5. Kasky's final contention that reversal of the judgment below would necessitate invalidating accepted forms of regulation of deceptive advertising is not correct. The principal statute Kasky cites, the FTC Act, does not confer a private right of action. Relief even for false "advertising" is limited to narrowly drawn prospective cease-and-desist orders, absent extraordinary circumstances in which the advertisements have left a firm misimpression in the public's mind. Montetary relief is unavailable at all unless "the defendant engaged in dishonest or fraudulent conduct." U.S. Br. 19 (citing 25 U.S.C. 57b(a)(2)).[5] The FTC also has not extended its enforcement authority beyond the context of advertising, packaging, and labeling to reach statements in the media like those in this case. See, *e.g.*, *FTC Enforcement Policy Statement on U.S. Origin Claims* (1997); *FTC Report on U.S. Origin Claims* (1997). There are thus three important distinctions between this case *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157 (CA7 1977). That ruling (i) granted the government a cease-and-desist order on the basis of false statements, (ii) that appeared in product advertisements, and (iii) that touted the effect of the product on consumers' health. Compare *Koch* v. *FTC*, 206 F.2d 311, 317 (CA6 1953) (FTC Act does not reach similar statements by a manufacturer in a book, because a book does not generate consumer reliance and because regulation of its contents would "violate the First Amendment").

---

[5] Other statutes piggyback on the FTC Act's enforcement scheme and thus carry that principal statute's limitations. They furthermore are limited to representations made on product labels or in the course of a sale or offer for sale. See 16 U.S.C. 1385 (dolphin safe); 18 U.S.C. 1159(a) (produced by Native Americans).

Government has a freer hand in regulating speech under the securities laws both because it is an area of longstanding, pervasive regulation and because financial markets immediately incorporate statements relating to a business's financial health. See *SEC* v. *Wall St. Publ'g Inst.*, 851 F.2d 365 (CADC 1988), *cert. denied*, 489 U.S. 1066 (1989); cf. *Glickman* v. *Wileman Bros.*, 521 U.S. 457 (1997). No state has a remotely comparable scheme of regulation of the retail sale of athletic apparel. But in any event, although a civil suit under the securities laws could conceivably rest on the defendant's statements in newspaper articles, op-eds, and the like, such a suit would have to allege fraud. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976). A lower standard of liability applies only when the statements arise in the course of a commercial transaction – *e.g.*, the submission of a registration statement, the sale of securities, or the issuance of a proxy solicitation. *E.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381-82 (1981); *Shidler* v. *All American Life & Fin. Corp.*, 775 F.2d 917, 926 (CA8 1985).

States occasionally regulate statements regarding matters of broader public importance that do not bear on the product's effects on buyers or users, such as whether it is made "in the U.S.A.," or by union members, blind workers, or Native Americans. But as even the examples Kasky collects (Br. 30 n.8, 31 n.11) make clear, almost all such regulations apply only to statements made in the course of a sale, in advertisements, or on the product's packaging or labeling, none of which is implicated by this case. They also do not provide nearly the breadth of remedies that the UCL and FAL do. And, a statute that places a seller on notice that it must henceforth be particularly careful with respect to a discrete set of factual representations has nothing like the chilling effect of the UCL and FAL, which apply to statements on every conceivable issue relating to the speaker's operations.

CONCLUSION

For the foregoing reasons, as well as those set forth in the opening brief of the petitioner, the judgment should be reversed.

Respectfully submitted,

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April 15, 2003

April 15, 2003

Hon. William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First St., NE
Washington, DC 20543

Re: No. 02-575, *Nike et al.* v. *Kasky*

Dear General Suter,

I serve as counsel of record to the petitioners in this matter and respectfully request that you circulate this letter to the Justices.

The *amicus curiae* brief filed by the Attorney General of the State of California (at 19-20 & n.10) contains the following serious allegation that petitioners have violated both federal law and the Rules of this Court:

> Nike apparently even ignored this Court's mandate that "the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the Attorney General of that State" when the constitutionality of a state law is "drawn into question" and the state has not appeared as a party. Sup. Ct. R. 29.4(c).
>
> /fn/The California Attorney General was not served with the Petitioner's Brief at the same time as the parties (the document was received on March 10, 2003) and is unaware of any document filed with this Court that indicates the potential applicability of 28 U.S.C. § 2403(b).

That allegation is so obviously and profoundly wrong as to be deeply irresponsible. The Petition for a Writ of Certiorari states, on page ii (bold-face type and capitalization in original):

RULE 29.4 CERTIFICATION

> Petitioner certifies that 28 U.S.C. 2403(b) may apply and that this Petition has been served upon the Attorney General of California.

Petitioners' Brief on the merits includes the *identical* certification (except that it refers to service of the Brief), also on page ii. As reflected in the Certificates of Service on file with this Court, Wilson-Epes Printing Co. duly served the Attorney General of California with both the Petition and the Brief on the merits.

It is unfathomable how the Attorney General could have made such false allegations that petitioners had violated federal law and this Court's Rules. The Attorney General could only have accused petitioners of not including the required certification in "the initial document filed in this Court" – *i.e.*, the Petition for Certiorari – by *failing to read the Petition.* And the Attorney General could have asserted that he was "unaware of any document filed with this Court that indicates the potential applicability of 28 U.S.C. § 2403(b)" only by *failing to read either the Petition or petitioners' Brief on the merits.*

The Attorney General's further reference to the circumstances in which he received petitioners' Brief on the merits is misleading as well. Because the State of California chose not to intervene in this case, it is not a party, and it has no *right* to be served with *any* document other than the Petition for Certiorari. Nor did the State contact Nike requesting service of the papers filed in this Court. Nonetheless, *as a courtesy*, petitioners provided the State with copies of its Reply in support of the Petition as well as its Brief on the merits. The Attorney General's suggestion to this Court that petitioners were somehow attempting to withhold materials from the State is not only a regrettable distortion of petitioners' *courtesy* in providing materials to the State, it also twists the facts. Petitioners mailed a copy of the page-proof filing of its Brief on merits to the Attorney General on the first business day after it was filed. Petitioners furthermore mailed copies of the printed Brief to the Attorney General *at the same time* as they were served upon respondent Kasky. As again reflected in the Certificates of Service, Wilson-Epes Printing Co. mailed both sets of briefs contemporaneously.

Immediately upon receiving the Attorney General's brief, we notified the State's Counsel of Record, Ronald Reiter, of these errors and requested that the State provide the Court with a correction. It would have been a simple matter for the State to acknowledge the mistakes or even to submit a corrected Brief. But instead, the Attorney General has categorically refused to acknowledge that it made *any* error, stating that the briefs in the case speak for themselves and that if petitioners wished to write to the Court the State would submit any response it deemed appropriate.

We pressed Mr. Reiter how there could be any dispute that a mistake had been made, explaining that, if the State declined to submit a correction, we would prefer to advise the Court of the error and that the matter was resolved. He would say only that he believed that a copy of the Petition has not been received by the Attorney General. Not only was the Petition properly served, but the Attorney General's office presumably secured a copy of it at some point. His brief thus repeatedly cites the Lodging that petitioners filed with this Court together with the Petition. And hopefully the State took the time to read not only the Petition but also petitioners' Brief on the merits (which, as noted, also sets out the certification in question), although admittedly the Attorney General never bothers to cite our brief in purporting to refute the arguments it presents. But all the foregoing matters little because it was obviously essential for the Attorney General to review the materials filed by petitioners before launching an allegation that those materials failed to comply with federal law and this Court's Rules. We therefore regret that the matter has occupied the Court's time, but hope that the Court will recognize that it was essential for petitioners to correct the record.

Very truly yours,

Laurence H. Tribe

cc: Attorney General of California and His Representatives ((by overnight service and fax)

Supreme Court U.S.
FEB 28 2003

No. 02-575

In the Supreme Court of the United States

NIKE, INC., ET AL., PETITIONERS

v.

MARC KASKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question, which is embraced within Question 2 of the petition for a writ of certiorari:

Whether the First Amendment, as applied to the States through the Fourteenth Amendment, permits a private party to seek redress for a company's allegedly false and misleading statements about the production of the goods that the company sells, if the private party himself did not rely on those statements, purchase the goods, or suffer any actual injury by reason of such reliance.

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D. Pridgen, *Consumer Protection and the Law* (2002) 10, 11, 12, 15
Restatement (Second) of Contracts (1981) 11, 12
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U.C.C. § 2-313, Official Cmt. 11

In the Supreme Court of the United States

No. 02-575

NIKE, INC. ET AL., PETITIONERS

v.

MARC KASKY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents important questions respecting the relationship between the First Amendment and laws that prohibit commercial entities from making false statements in the marketplace respecting products and services. The United States, which enforces a variety of laws that are designed to prevent fraud and protect the public from injurious false statements, has a substantial interest in those questions.

STATEMENT

Respondent Marc Kasky, sued petitioners Nike, Inc., et al., in state superior court under the State of California's unfair competition laws. Cal. Bus. & Prof. Code §§ 17200 *et seq.* (West 1997). See First Amended Complaint (Compl.) paras. 1, 13.[1] Claiming no personal injury and, instead, pur-

[1] Respondent's first amended complaint is reprinted in petitioners' lodging on file with the Clerk of this Court.

porting to act on behalf of the general public, respondent alleged that Nike made false representations respecting the working conditions of those who manufactured Nike's products. *Id.* paras. 1, 8. Respondent sought injunctive relief, including disgorgement of monies that Nike allegedly acquired on account of those statements. Compl., Prayer for Relief para. 1. The superior court granted Nike's demurrer and dismissed the complaint. Pet. App. 80a-81a. The California Court of Appeal affirmed, holding that Nike's alleged misstatements were part of a public dialogue protected by the First Amendment. *Id.* at 66a-79a. The California Supreme Court reversed, holding that Nike's statements instead constituted "commercial speech" that is subject to state laws regulating false and misleading advertisements. *Id.* at 1a-65a.[2]

1. Nike is a well-known manufacturer and retailer of athletic shoes and apparel, with annual revenues in 1997 of $9.2 billion and annual advertising expenditures approximating $1 billion. Compl. paras. 1, 13. Most of Nike's products are manufactured by subcontractors located in China, Vietnam, and Indonesia, and most of the workers that make Nike products are women under the age of 24. *Id.* para. 21. In recent years, various persons and organizations have criticized the working conditions under which Nike products are manufactured in Asia. See, *e.g.*, *id.* para. 18.

Nike has entered into a memorandum of understanding with each of its subcontractors, pursuant to which the subcontractor assumes legal responsibility for ensuring compliance with applicable governmental regulations regarding minimum wages, overtime, health and safety, environmental hazards, and ensuring that workers making Nike products will not be put at risk of physical harm. Compl. para. 22 &

[2] For purposes of this proceeding, the facts alleged in the complaint are assumed to be true.

Exh. O. In 1997, Nike commissioned an independent investigation of its Asian operations, headed by former U.S. Ambassador to the United Nations Andrew Young. *Id.* para. 55. Mr. Young formed a firm—"GoodWorks International"—to conduct the investigation, and the firm issued its report in July 1997. *Id.* paras. 55, 56.

2. In April 1998, respondent, a "resident of the City and County of San Francisco, California," Compl. para. 8, sued Nike for unfair and deceptive practices under California's unfair competition law "on behalf of the General Public of the State of California." *Id.* para. 1. Respondent charged that "in order to maintain and/or increase its sales," Nike made a number of "false statement and/or material omissions of fact" concerning the working conditions under which Nike products are manufactured. *Ibid.* In particular, respondent alleged that Nike made the following statements, which respondent contended were false and deceptive: (1) "workers who make NIKE products are protected from and not subjected to corporal punishment and/or sexual abuse," (2) "NIKE products are made in accordance with applicable governmental laws and regulations governing wages and hours," (3) "NIKE products are made in accordance with applicable laws and regulations governing health and safety conditions," (4) "NIKE pays average line-workers double-the-minimum wage in Southeast Asia," (5) "workers who produce NIKE products receive free meals and health care," (6) "the GoodWorks International (Andrew Young) report proves that NIKE is doing a good job and 'operating morally,'" and (7) "NIKE guarantee[s] a 'living wage' for all workers who make NIKE products." *Ibid.*

Respondent affirmatively alleged that he suffered "no harm or damages whatsoever regarding himself individually" by reason of Nike's allegedly false and misleading statements. Compl. para. 8. Respondent nonetheless sought a preliminary and permanent injunction enjoining Nike from

"[m]isrepresenting the working conditions under which NIKE products are made," ordering the company to "undertake a Court-approved public information campaign to correct" any Nike statements that are found to be misleading or deceitful, and requiring Nike to "disgorge all monies" which Nike is found to have acquired by means of its unlawful and unfair business practices. Compl., Prayer for Relief para 1. Respondent also sought attorneys' fees and costs. *Ibid.*

3. Nike filed a demurrer to the complaint, contending that respondent's suit was barred by the First Amendment and the California Constitution. Following a hearing, the trial court sustained the demurrer without leave to amend and entered a judgment of dismissal. Pet. App. 80a-81a. Respondent appealed, and the California Court of Appeal affirmed, holding that Nike's statements "form[ed] part of a public dialogue on a matter of public concern within the core area of expression protected by the First Amendment." *Id.* at 79a.

4. The California Supreme Court reversed the superior court's judgment and remanded the case for further proceedings. The court held that Nike's statements constituted "commercial speech" and were therefore unprotected by the First Amendment from California's laws barring false and misleading commercial messages. The court concluded that they constituted commercial speech because they were "directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting the sales of its products." Pet. App. 1a.

The court explained that, in determining "whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the

message." Pet. App. 17a-18a (emphasis omitted). The court found that respondent's allegations in this case satisfied all three elements of its commercial speech test. First, the court found that Nike is a commercial speaker because the company manufactures, distributes and sells athletic shoes and apparel worldwide. *Id.* at 21a. Second, the court determined that Nike's statements were made to a commercial audience. "Nike's letters to university presidents and directors of athletic departments," the court stated, "were addressed directly to actual and potential purchasers of Nike's products." *Ibid.* In addition the court observed that respondent's complaint alleged that "Nike's press releases and letters to newspaper editors, although addressed to the public generally, were also intended to reach and influence actual and potential purchasers of Nike's products." *Ibid.* Third, the court determined that "[i]n describing its own labor policies, and the practices and working conditions in factories where its products are made, Nike was making factual representations about its own business operations." *Id.* at 22a.

The court ultimately concluded that "[s]peech is commercial in its content if it is likely to influence consumers in their commercial decisions" and that "[f]or a significant segment of the buying public, labor practices do matter in making consumer choices." Pet. App. 28a. The court emphasized that its decision "in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices." *Id.* at 2a. "It means only that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." *Ibid.*[3]

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[3] The court saw no need "to articulate a separate test for commercial speech under the state Constitution." Pet. App. 29a. Instead, "[h]aving

Justice Chin, joined by Justice Baxter, dissented. The dissenting justices criticized the majority for "[h]andicapping one side" in an "important worldwide debate" regarding globalization of manufacturers. Pet. App. 31a. They emphasized that "Nike's statements regarding its labor practices in China, Thailand, and Indonesia provided vital information on the very public controversy concerning using low-cost foreign labor to manufacture goods sold in America." *Id.* at 34a. "At the very least," they stated, "this case typifies the circumstance where commercial speech and noncommercial speech are 'inextricably intertwined.'" *Id.* at 37a. Justice Brown also dissented. She agreed with her dissenting colleagues that "the commercial elements of Nike's press releases, letters, and other documents were inextricably intertwined with their noncommercial elements." *Id.* at 59a. In addition, Justice Brown criticized the "rigid dichotomy" between commercial and noncommercial speech, which in her view "fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries." *Id.* at 43a. Justice Brown concluded that the courts need to "adapt the commercial speech doctrine to the realities of today's commercial world," *id.* at 64a, by "develop[ing] a more nuanced approach that maximizes the ability of businesses to participate in the public debate while minimizing consumer fraud." *Id.* at 44a.

SUMMARY OF ARGUMENT

The California Supreme Court mistakenly ruled that respondent's private action should proceed because the suit, according to that court, challenges "commercial speech" that is not subject to the First Amendment's protections. The

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concluded that the speech at issue is commercial speech under the federal Constitution," the court "reach[ed] the same conclusion under the California Constitution." *Ibid.*

California Supreme Court overlooked a more fundamental difficulty with respondent's suit. Respondent seeks judicial relief for allegedly false statements that have concededly caused respondent no harm whatsoever. The First Amendment does not countenance that novel form of private action in light of its severe threat to freedom of speech.

I. The First Amendment permits reasonable regulation of speech that is false, deceptive, or misleading, through the mechanisms of private causes of action and direct government regulation. A traditional common-law private suit for misrepresentation presents no First Amendment difficulties because it contains features that obviate potential constitutional concerns. A private plaintiff who seeks relief for misrepresentation must show that he reasonably relied on the false statement and consequently suffered actual injury. Those requirements limit the prospect of liability to cases that implicate the government's interests in preventing fraud and compensating injured individuals, and thereby ensure that the lawsuit does not chill protected expression. Similarly, the government's traditional means of regulating false advertising present no First Amendment difficulties. The government's enforcement powers are constrained by statutory and institutional limitations that avoid intrusions on protected speech.

II. Respondent's unconventional lawsuit, by contrast, rests on a private cause of action, sanctioned by California's unfair competition laws, that lacks traditional safeguards. Respondent claims the right under California's laws to obtain judicial relief for a company's allegedly false statements respecting its products, even though respondent did not rely on those statements or suffer any injury whatsoever. The First Amendment does not tolerate this novel species of private action, which poses a serious threat of unjustifiable chill to legitimate speech on matters of public interest. Because this private enforcement mechanism is

incompatible with the First Amendment, respondent's suit should be dismissed without regard to whether the allegedly false statements at issue constitute "commercial" or "non-commercial" speech.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS STATES FROM EMPOWERING PRIVATE PERSONS WHO HAVE SUFFERED NO HARM TO SEEK JUDICIAL RELIEF FOR ALLEGEDLY FALSE STATEMENTS

Nike and respondent have joined issue throughout these proceedings on whether the statements in question here constitute part of a public dialogue on matters of public interest, and are therefore entitled to the First Amendment's protections, or whether those statements instead constitute "commercial speech" that is subject to laws that regulate false or misleading advertising. That characterization of the issue, however, obscures the key feature of this case that should control its disposition. The First Amendment, which is applied to the States through the Fourteenth Amendment, allows government regulation of speech that is false, deceptive, or misleading. It does not, however, allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements.

Regardless of whether Nike's statements are "commercial" or "non-commercial" speech, they are not actionable in a private suit unless the plaintiff alleges not only that the statements were false, but that he himself relied on them and, as a result, suffered injury in fact warranting judicial relief. In the context of private causes of action, those requirements ensure that any restriction on speech is justified by the government's interest in preventing actual fraud and compensating injured individuals. Those same requirements give substantial protection for speech, even by a corporation, that does not injure individuals or materially affect their purchasing decisions. California's contrary regime unduly burdens and deters speech—whether commercial or non-commercial—and is inconsistent with First Amendment values.

I. THE FIRST AMENDMENT PERMITS REASONABLE GOVERNMENTAL REGULATION OF SPEECH THAT IS FALSE, DECEPTIVE, OR MISLEADING

For two centuries, the First Amendment has comfortably co-existed with the private common-law causes of action and legislation that protect purchasers of goods and services from deception, including fraud, intentional misstatements, and negligent or innocent misrepresentation. Courts and legislatures have developed legal principles to ensure the integrity of representations made in the marketplace. Those principles encourage commerce by allowing marketplace participants to rely on representations that may affect their decisions whether to buy or sell goods and services. Those traditional government limitations on false statements are unquestionably compatible with the First Amendment.

A. The Traditional Private Causes Of Action For Fraud And Deception Include Self-Limiting Features That Ensure Consistency With The First Amendment

The courts have long recognized that false statements in the marketplace are actionable, irrespective of the public's right of free speech, if the statements induce reliance and result in actual injury. The traditional principles that govern judicial actions for commercial misrepresentations have always required a substantial link between the challenged statements and the resulting injury. That required link eliminates the prospect that a private action for misrep-

resentation respecting a commercial product or transaction might chill protected speech.

For example, the common law has long permitted fraud actions against individuals who make knowingly false representations for the purpose, and with the effect, of inducing others to act in justifiable reliance thereon. See Restatement (Second) of Torts § 525 (1977); *e.g.*, *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383 (1888). To bring such an action, however, a private plaintiff must show more than that the seller made a false statement, or even a knowingly false statement. The plaintiff also must show that he actually relied on the misrepresentation in deciding whether or not to enter into the transaction, that the misrepresentation was material, and that he suffered damage as a result. See D. Pridgen, *Consumer Protection and the Law* § 2.2, at 2-5 (2002).

This Court's decision in *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26 (1839), illustrates the important role of materiality and reasonable reliance. In that case, the Court ruled that the defendant was liable for misstatements respecting the character of a gold mine that the purchaser bought in reliance on the seller's representations. The Court affirmed the rescission of the resulting agreement, stating:

> We think we may safely lay down this principle, that wherever a sale is made of property, not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation, in effect, amounts to a warranty; at least, that the seller is bound to make good the representation.

Id. at 42. The Court considered the seller's intent to be irrelevant, stating, if "he takes upon himself to make a representation to another, upon the faith of which the other

acts, no doubt he is bound; though his mistake was perfectly innocent." *Id.* at 35-36.

A common-law action for fraud generally requires a showing of intent to deceive or a knowing or reckless falsehood. See Restatement (Second) Torts § 525; *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 502 & n.19 (1984) (noting the "kinship" between the "actual malice" standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and the "motivation that must be proved to support a common-law action for deceit"). Nonetheless, consistent with *Smith*, the common law courts often allow private remedies for even innocent misrepresentation, so long as the misstatements have induced reasonable reliance and result in actual harm. Invoking principles of unjust enrichment, state courts have reasoned that it would be "inequitable to allow a person who made a misrepresentation (however innocently) to retain the benefit of the bargain induced by her own misrepresentation." D. Pridgen, *supra*, § 2.25, at 2-62; *id.* § 2.25, at 2-63 ("the trend seems to be to place the loss on the innocent defendant who has misrepresented rather than the innocent plaintiff who has been misled.").[4]

The common law courts have nevertheless cabined the scope of such actions by limiting recovery to those suffering actual injury and by restricting the available forms of relief. The plaintiff must seek relief for the injuries he himself suffered on account of his reasonable reliance on the

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[4] Courts and commentators have reached similar conclusions based on theories that misrepresentations may render contracts voidable or result in a breach of warranty. See Restatement (Second) of Contracts §§ 159, 164 (1981) (innocent misrepresentation may render contract voidable if "assent is induced" by it, the misrepresentation is "material," and reliance is justifiable); Uniform Commercial Code § 2-313, Official Cmt. (seller's affirmation to the buyer concerning the goods that forms part of the bargain "creates an express warranty"); W. Keeton, *Prosser & Keeton on Torts* § 107, at 748 (Lawyer's ed. 5th ed. 1984).

materially false statements. See D. Pridgen, *supra*, § 2.26, at 2-64; *Prosser & Keeton on Torts* § 108; Restatement (Second) of Contracts § 164, at 446 (cmts. b and c). The corresponding relief is typically limited to rescission, or a measure of damages "only to the extent necessary to compensate the plaintiff for the fact that he was induced to part with something more valuable than that which he has received," a measure of damages "substantially the same as rescission." *Prosser & Keeton on Torts* § 107, at 748.

The self-limiting principles of common-law actions for fraud, misrepresentation, and deceit ensure that such actions generally raise no serious First Amendment concerns. The traditional common-law actions for misrepresentation all require, as an initial matter, that the challenged statement be *false or misleading*. As the Court has explained in connection with defamation suits, "there is no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 340 (quoting *Sullivan*, 376 U.S. at 270).

Further, the common law's traditional limits on who may sue ensure that private lawsuits or the threat thereof do not become an inappropriate means of restricting or chilling the free flow of useful information. As this Court has recognized, "erroneous statement[s] of fact" are "inevitable in free debate" respecting public issues, *Gertz*, 418 U.S. at 340, and they occur in the marketplace as well. Consequently, punishing or imposing liability for all untruthful or misleading speech, at the behest of any person who may be motivated to sue, could inhibit a speaker from voicing his view, "even though [he] believe[s] [it] to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279. Such a regime could cause individuals "to make only

statements which 'steer far wider of the unlawful zone,'" thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." *Ibid.*

The traditional private causes of action for misrepresentation pose scant risk of impinging on First Amendment values because they do not allow private plaintiffs to bring lawsuits based on misrepresentations "in the air," divorced from their actual effects. Cf. *Palsgraf* v. *Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) ("Proof of negligence in the air, so to speak, will not do."). A plaintiff has no cause of action unless he has entered into a transaction (or was deterred from doing so) in reliance on a misrepresentation and was injured as a result. See pp. 9-12, *supra*. Those requirements ensure that lawsuits, and the threat thereof, properly reflect society's strong interests in ensuring the integrity of transactions and compensating those suffering actual injury—not the plaintiff's desire to squelch an expression or viewpoint with which he happens to disagree. The Court made essentially this point in *Gertz* in applying a less demanding standard of scienter for claims seeking compensation for "actual injury," as opposed to presumed or punitive damages. The Court recognized "the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation," but also noted that this "interest extends no further than compensation for actual injury." *Gertz*, 418 U.S. at 348, 349. And because the traditional suit for misprepresentation is directed at what is essentially conduct—the inducement and execution of a purchase or sale—rather than the content of the speech itself, it poses diminished risk of chilling protected expression.

The self-limiting features of the private common-law actions for misrepresentation also obviate abstract and often difficult inquiries into whether a particular statement should receive lesser constitutional protection based on whether it might be characterized as "commercial" or "non-commercial"

speech. The government has a compelling interest in ensuring that consumers are not induced to make purchases based on materially false statements and have an appropriate level of confidence in the representations that are made, regardless of the subject matter of the statements. On the other hand, speech that does not injure individuals or materially affect their purchasing decisions cannot be affected by private actions for misrepresentation. By requiring the private plaintiff to be an actual purchaser who relied on a misrepresentation that was material to the transaction and suffered actual injury as a result, the common-law actions ensure a sufficient nexus between the speech and the integrity of the underlying transactions that the government has an interest in promoting and protecting. There is, accordingly, no need for an abstract inquiry into the "commercial" nature of the speech. The falsity of the statement, its materiality to an identifiable transaction or incident, and the private plaintiff's reasonable reliance leading to actual injury provide a sufficient and constitutionally permissible basis for relief.

B. The Traditional Mechanisms By Which The Government Directly Regulates False Advertising Also Include Self-Limiting Features That Ensure Consistency With The First Amendment

The United States and the individual States have long recognized the need for direct government regulation of advertising to protect the public from false or misleading commercial statements. Sensible regulation promotes market efficiencies, because it frees consumers from the need to conduct individual investigations into the truthfulness of advertising and enables them to make commercial decisions with greater confidence than in a market where the mandate of caveat emptor alone controls. Congress and the States have accordingly enacted legislation to prevent deceptive or

misleading advertising and to remedy, through government enforcement actions, injuries that cannot be effectively cured through private suits. As in the case of traditional common-law actions, the traditional mechanisms of direct government regulation have inherent safeguards that avoid chilling protected speech.

A primary source of federal regulation is the Federal Trade Commission Act (FTC Act). See 15 U.S.C. 41 *et seq.* The FTC Act empowers the Federal Trade Commission (FTC) to issue cease and desist orders against "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. 45(a), including the dissemination of "false advertisements." 15 U.S.C. 52.[5] Similarly, Congress has empowered the Postal Service to proceed against false and fraudulent schemes that use the mails. See 39 U.S.C. 3005; *Donaldson* v. *Read Magazine*, 333 U.S. 178, 191 (1948); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904). Finally, the Lanham Trade-mark Act, 15 U.S.C. 1051 *et seq.*, provides for a civil action under federal law against any person who, "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities." 15 U.S.C. 1125(a)(1)(B).

The FTC applies a three-pronged test to determine whether advertising is deceptive within the meaning of the FTC Act. The FTC inquires whether: "(1) a claim was made; (2) the claim was likely to mislead a reasonable consumer and (3) the claim was material." *Novartis Corp.* v. *FTC*, 223 F.3d 783 (D.C. Cir. 2000) (citation omitted); see generally Letter from James C. Miller, III, FTC Chairman, to Rep. John Dingell (Oct. 14, 1983) (FTC Policy Statement),

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[5] Numerous States have similar authority under so-called Little FTC Acts. See D. Prigden, *supra*, § 3.5.

available in In re Cliffdale Assocs., Inc., 103 F.T.C 110, 174-184 (1984) (App.). A claim is "material," under the Commission's standards, if it is one that "is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Novartis*, 223 F.3d at 786 (quoting *Cliffdale*, 103 F.T.C. at 165).[6] To be actionable under the postal fraud statute or the Lanham Act, the false or misleading statement must likewise be material to a consumer's decision, see *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1042 (9th Cir. 1991) (postal statute); *Lynch* v. *Blount*, 330 F. Supp. 689, 693 (S.D.N.Y. 1971), aff'd mem., 404 U.S. 1007 (1972) (postal statute); *Pizza Hut, Inc.* v. *Papa John's Int'l, Inc.*, 227 F.3d 489, 495 (5th Cir. 2000) (Lanham Act), cert. denied, 532 U.S. 920 (2001).[7]

The Federal Trade Commission has exclusive authority to initiate proceedings under the FTC Act; there is no private right of action of any kind. See *Carlson* v. *Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973); *Holloway* v. *Bristol-Myers Corp.*, 485 F.2d 986, 1002 (D.C. Cir. 1973); see also *Moore* v.

[6] "The Commission has historically *presumed* materiality for certain categories of claims: (1) all express claims, (2) intentional implied claims and (3) claims that 'significantly involve health, safety, or other areas with which the reasonable consumer would be concerned,' including a claim that 'concerns the purpose, safety, efficacy, or cost of the product or service,' its 'durability, performance, warranties or quality,' or 'a finding by another agency regarding the product.'" *Novartis*, 223 F.3d at 786 (quoting FTC Policy Statement, *Cliffdale*, 103 F.T.C. at 182)).

[7] Neither the FTC Act, see, *e.g.*, *Removatron International Corp.* v. *FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989); *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d 294, 309 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980), nor the postal statute, see *Lynch* v. *Blount*, 330 F. Supp. 689, 692-694 (S.D.N.Y. 1971), aff'd mem., 404 U.S. 1007 (1972), nor the Lanham Act, see *Johnson & Johnson* v. *Carter-Wallace, Inc.*, 631 F.2d 186, 189 (2d Cir. 1980); *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958), requires, as a precondition to relief, a demonstration that the defendant had an intent to deceive.

New York Cotton Exch., 270 U.S. 593, 603 (1926).[8] The government need not show, of course, that *it* relied on the misleading statements or that the government *itself* was injured. Rather, the government has the unique sovereign responsibility to protect the public. Because the government has a responsibility to *prevent* deceptive and fraudulent practices from causing injury, it may take enforcement action without regard to whether any person has relied on the misrepresentations or has yet been injured thereby. The focus of government enforcement, instead, is typically whether the false claims are material to consumer choice. The government's remedies are consonant with the role of government enforcement. "[I]n proper cases," the FTC "may seek and after proper proof, the court may issue, a permanent injunction," 15 U.S.C. 53(b), which may include monetary equitable relief, such as restitution and disgorgement. See *FTC* v. *Febre*, 128 F.3d 530, 537 (7th Cir. 1997) (disgorgement); *FTC* v. *Gem Merch. Corp.*, 87 F.3d 466, 469-470 (11th Cir. 1996) (disgorgement); *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102-1103 (9th Cir. 1994) (restitution), cert. denied, 514 U.S. 1083 (1995); *FTC* v. *Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir.), cert. denied, 493 U.S. 954 (1989).

Neither this Court, nor any other, has suggested that these traditional forms of government regulation of false advertising produce unacceptable chill or impinge on First Amendment values. See, *e.g.*, *Bristol-Myers Co.* v. *FTC*, 738

[8] The Lanham Act requires plaintiffs to allege competitive injury and does not permit false advertising suits by consumers. See *Serbin* v. *Ziebart Int'l Corp.*, 11 F.3d 1163 (3d Cir. 1993); *Colligan* v. *Activities Club of N.Y., Ltd.*, 442 F.2d 686, 694 (2d Cir.), cert. denied, 404 U.S. 1004 (1971). Moreover, an award in a Lanham Act false advertising case "based on defendant's profits" appears to "require[] proof that the defendant acted willfully or in bad faith." *ALPO Petfoods, Inc.* v. *Ralston Purina Co.*, 913 F.2d 958, 968 (D.C. Cir. 1990) (Thomas, J.).

F.2d 554, 562 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *Harry & Bryant Co.* v. *FTC*, 726 F.2d 993, 1001-1002 (4th Cir.), cert. denied, 469 U.S. 820 (1984); *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 972 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *United States Postal Serv.* v. *Athena Prods.*, 654 F.2d 362, 367 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *Vidal Sassoon, Inc.* v. *Bristol-Myers Co.*, 661 F.2d 272, 276 n.8 (2d Cir. 1981). Cf. *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961) ("general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests").

Moreover, the institutional checks on government enforcement provide ample protection for protected speech. As an initial matter, government enforcement is subject to public interest constraints that tend to avoid First Amendment conflicts. Because the government has exclusive authority to prosecute false advertising, because its prosecutions must meet materiality standards, and because it has limited resources to prosecute consumer fraud, federal officials must exercise their discretion so as to select for prosecution those cases that represent the best use of public resources. Unlike private parties, federal officials are politically accountable for their decisions. They are subject to public and congressional oversight, which creates strong incentives to exercise enforcement discretion wisely. The government's enforcement actions are accordingly limited to those false statements most likely to harm consumers. Cf. *Alden* v. *Maine*, 527 U.S. 706, 759-760 (1999).

In addition, the government has discretion in selecting remedies that balance the public interest against legitimate rights of free expression. The government may, and frequently does, seek to remedy false statements through prospective relief requiring cessation of false advertising or correction of misstatements, without pursuing restitution or disgorgement of profits. See, *e.g.*, *National Comm'n On Egg Nutrition* v. *FTC*, 570 F.2d 157 (7th Cir. 1977) (FTC entered a final order directing petitioners to cease and desist from disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease), cert. denied, 439 U.S. 821 (1978). Indeed, for those cases initiated as administrative proceedings, the FTC does not have authority to seek monetary relief unless it brings a separate case in district court and shows that the defendant engaged in dishonest or fraudulent conduct. See 15 U.S.C. 57b(a)(2).[9]

Furthermore, the FTC and the Postal Service have developed a coherent body of decisions on consumer fraud that channel agency decision-making and enable individuals and corporations to determine before they speak what sorts of statements might make them subject to suit. See, *e.g.*, *Guides for the Use of Environmental Marketing Claims*, 16 C.F.R. Pt. 260. They also may seek guidance from the FTC on proposed conduct, and any guidance that the government provides becomes part of the public record. See 16 C.F.R. 1.1-1.4. As the District of Columbia Circuit has explained, the federal government's body of decisions help to "provid[e] certainty and specificity to the [broad] proscriptions of the Act" by allowing "for the centralized and orderly development of precedent applying the regulatory statute to a diversity of fact situations." *Holloway* v. *Bristol-Meyers Corp.*, 485 F.2d 986, 998 (1973). In contrast, "[p]rivate litigants are

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[9] The Postal Service's remedial authority extends only to denying fraudulent schemes the use of the mails, refusing to pay postal money orders, and issuing cease and desist orders. 39 U.S.C. 3005(a). The statute does not speak to injunctive or restitutionary relief.

not subject to the same constraints," and "may institute piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program," thereby "burden[ing] not only the defendants selected but also the judicial system." *Id.* at 997-998. This Court similarly recognized the greater risk to First Amendment interests from private defamation suits relative to criminal prosecutions. *Sullivan*, 376 U.S. at 277-278.

II. THE FIRST AMENDMENT BARS RESPONDENT'S PRIVATE LAWSUIT, WHICH RESTS ON A NOVEL LEGAL REGIME THAT CAN CHILL PROTECTED SPEECH

There is no question that the United States or a State may recognize the traditional private causes of action for misrepresentation, or take direct government action to prevent or remedy false advertising, without transgressing the First Amendment. Respondent's lawsuit, however, falls outside those traditional and fully constitutional domains. The lawsuit at issue here is predicated on California's novel consumer protection laws, which lack the constraining features that have traditionally served to prevent any conflicts from arising between the First Amendment and laws that prohibit fraud and regulate false advertising. In particular, California's apparently unique provision that a private party may sue for misrepresentation—even though the party did not reasonably rely on the statement, did not make a purchase, and was not injured in any way—has the capacity to chill protected speech. The state courts cannot, consistent with the First Amendment, provide a forum for such private suits. See *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 668 (1991) (A State's enforcement of legal obligations "through the official power of the [State's] courts * * * is enough to constitute 'state action' for purposes of the Fourteenth Amendment.").

A. California Law Authorizes A Private Cause Of Action That Transgresses the First Amendment

California's unfair competition laws provide an unusual private judicial remedy. Unlike traditional common law causes of action, federal prohibitions, and the consumer protection laws of other States, California permits private lawsuits challenging allegedly false advertising without regard to the traditional limitations that obviate First Amendment concerns, with the resulting possibility of chilling the scope of public debate and the free flow of useful information. See *Riley* v. *National Fed'n for the Blind of N.C., Inc.*, 487 U.S. 781, 794 (1988); *Sullivan*, 376 U.S. at 279.

Under California law, "any person" may sue for false advertising in a representative capacity "acting for itself, its members or the general public," see Cal. Bus. & Prof. Code §§ 17204, 17535 para. 2, without establishing any injury or satisfying the regular requirements for certifying a class. See, *e.g.*, *Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 950 P.2d 1086, 1091 (Cal. 1998). To obtain injunctive relief, a plaintiff need only show that the defendant's practices are "likely to deceive" the public. *Committee On Children's Television, Inc.* v. *General Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983). "*Allegations of actual deception, reasonable reliance, and damage are unnecessary.*" *Id.* at 668 (emphasis added). Those provisions, in the context of private party suits, create severe First Amendment concerns, particularly in connection with the broad remedies that California law affords. They open the door to private lawsuits that seek judicial relief despite the fact that the allegedly false statements caused no actual injury to the plaintiff and potentially no injury to anyone.

As this Court explained in *Gertz*, there is a "strong and legitimate state interest in compensating individuals for injury"—in that case injury to reputation. 418 U.S. at 348.

As noted above, the common law properly recognizes that misrepresentation is actionable if the plaintiff reasonably relies on a false statement that results in tangible harm. But here, as in *Gertz*, the state interest in providing a remedy in private litigation generally "extends no further than compensation for actual injury." *Id.* at 349. See *Sullivan*, 376 U.S. at 277 (expressing concern that Alabama defamation law imposes liability "without the need for any proof of actual pecuniary loss"). The State's interest in protecting transactions and consumers does not justify a legal regime in which a private plaintiff may sue, not to seek personal redress for any harm resulting from the misstatement, but rather because the plaintiff disagrees, as a theoretical matter, with the content or accuracy of the statement. *Gertz* is particularly instructive because the Court adopted a heightened standard of scienter for a plaintiff to obtain presumed or punitive damages without showing actual injury because the authorization of recovery "without evidence of actual loss" was "an oddity of tort law." 418 U.S. at 349. That is precisely the circumstance presented here. California law is anomalous in allowing a private plaintiff to sue without any allegation of injury. In fact, respondent expressly "alleges no harm or damages whatsoever regarding himself individually." Compl. para. 8.[10]

Respondent's suit poses a particular prospect for chilling speech because California law appears to allow private

[10] To be sure, the Court allowed the recovery of presumed and punitive damages upon a less demanding showing in cases involving speech on a matter of purely private concern in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). But although that result suggests that speech on purely private matters may be subject to even less protection, it provides no support for a statute that dispenses with any requirement that the plaintiff suffer actual injury. The chill that concerned the Court in *Sullivan* and *Gertz* would have been much greater if the defamation actions at issue there were not limited to those allegedly defamed.

parties to obtain substantial monetary awards based on no more than a threshold showing of materiality. So long as the "likely to deceive" threshold is met, the California courts may order restitutionary relief at the behest of a private party without regard to whether that party was deceived or injured. The court need only determine such relief is "necessary to prevent the use or employment of an unfair practice." *Bank of the West* v. *Superior Court*, 833 P.2d 545, 553 (Cal. 1992); *Committee on Children's Television*, 673 P.2d at 668-669; *Fletcher* v. *Security Pac. Nat'l Bank*, 591 P.2d 51, 54 (Cal. 1979).[11]

California's broad license to "private attorneys general," coupled with the absence of any requirement that the plaintiff show actual deception, reliance, or injury, poses a threat to speech respecting commercial activities and conduct. The California regime lacks the institutional checks that have traditionally accompanied government enforcement schemes, including legislative oversight and public accountability, and raises the prospect of vexatious and abusive litigation. Cf. *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 775-776 (2000) (noting the historic abuse of "informer statutes"). The California regime allows private lawsuits that are motivated, not by the need to redress for actual harm, but rather by disagreement with the speaker's policies, practices, or points of view, or by the prospect of financial gain.

California's regime is particularly troubling because the scope of restitutionary relief appears wide-ranging and provides potentially enormous rewards to entrepreneurial plaintiffs. By its terms, the law authorizes the courts, at the

[11] A representative plaintiff proceeding under the California unfair competition law may not obtain damages or attorney's fees. Pet. App. 6a. See *Cortez* v. *Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 712 (Cal. 2000); *Bank of the West*, 833 P.2d at 552.

behest of a private party, to "make such orders or judgments * * * as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Cal. Bus. & Prof. Code § 17203; accord *id.* § 17535 para. 1 ("The court may make such orders or judgments * * * which may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any practice in this chapter declared to be unlawful.").

For example, the California Supreme Court has rejected the argument that "in order to obtain any monetary recovery under section 17535," private plaintiffs "must present individual proof that each allegedly defrauded consumer seeking restitution did not know of the fraud." *Fletcher*, 591 P.2d at 56. The court explained that the statute's provision for restitution of money that "may have been acquired" by means of an unfair practice "is unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction." *Id.* at 56-57. Thus, an order for restitution under the California unfair competition law "may require the defendant 'to surrender all money obtained through an unfair business practice' including 'all profits earned as a result of an unfair business practice.'" Pet. App. 6a (quoting *Kraus* v. *Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 725 (Cal. 2000)). Respondent seeks to avail himself of this power to its full extent by requesting an order requiring Nike "to disgorge all monies which NIKE acquired by means of any act" that is found to be an unlawful practice under the California unfair competition law. Compl., Prayer for Relief para. 1. The provision of broad authority to seek such remedies without proving an actual injury to specified individuals is by no means inappropriate for governmental

agencies charged with enforcing the law. Such agencies are subject to numerous constraints and can be expected to exercise appropriate discretion in the invocation. See pp. 14-20, *supra*. Indeed, Congress has granted the FTC such authority. But to arm millions of private citizens with such potent relief, and to permit them to demand it without showing of injury to themselves or anyone else, unacceptably chills speech, particularly unpopular speech that is likely to become the target of such lawsuits.[12]

California's grant of such novel, broad, and unconstrained powers to private plaintiffs threatens to dampen protected expression. Companies like Nike that seek to engage in a debate on issues of public concern with a connection to their own operations (if only to respond to their critics) may well think long and hard before subjecting themselves to the risk of a judgment, at the behest of a single resident in California, that divests them of their profits on the basis of a statement that, after the fact, is held to have been "likely to deceive" the public, even if it injured no one. California's private cause of action may thus deter commercial speakers from addressing the very issues of public concern about which they may be most knowledgeable, despite the fact that the speakers believe their statements "to be true" and even though the statements are "in fact true"—"because of doubt whether [they] can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 279. The potential for massive monetary liability for past statements may cause even a company of Nike's size to refrain from presenting its side of the story, or to do so only in vague—and far less

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[12] It is not an answer to those remedial concerns to allow the case to go forward and determine the constitutionality of the remedies at a later juncture. The lack of any requirement of injury or reliance, while compounded by the availability of potentially broad disgorgement remedies, suffices to render the state law incompatible with the First Amendment.

informative—generalities. If this result were to obtain, debate on public issues would be the poorer.

B. There Is No Need In This Case To Decide Whether The Allegedly False Statements At Issue Here Are "Commercial" or "Non-Commerical" Speech

Because the above-described defects in California's private enforcement regime render it inconsistent with the First Amendment, this Court has no occasion to decide whether the speech at issue here is in fact "commercial" within the meaning of its cases. Indeed, the Court ought not address that issue, because it arises here, in a particularly abstract form, only by virtue of the unusual—and we think unconstitutional—private cause of action that is unique to California law.

As noted above, in typical private actions for deception or misrepresentation, there is rarely, if ever, any need to distinguish between commercial and non-commercial speech. If a plaintiff can show that he was deceived by a material misrepresentation, reasonably relied on it, and entered (or refrained from entering) into an actual transaction because of it, the misrepresentation provides a basis for relief that does not implicate First Amendment concerns. Suits of that sort provide ample breathing room for legitimate free expression. There is simply no need for the courts to evaluate the "nature" of the speech divorced from the actual commercial transactions that they are alleged to have affected. The fact that the statement was "material" to the transaction, induced reasonable reliance, and caused injury, renders the statement actionable without inquiry into its "commercial" or "non-commercial" character.

Nor does the issue often arise in government enforcement cases. Agencies like the FTC have established guidelines for enforcement that take context into account and focus their limited resources on the cases that matter most—those most

likely to have an effect on actual transactions. Their enforcement actions thus reflect society's strong interest in ensuring the integrity of actual or proposed transactions, not abstract disagreements with the speaker. When an agency like the FTC brings an enforcement action, the court also has the benefit of the agency's expertise, investigation, and record.

Significantly, the determination whether the speech at issue here is "commercial" or "non-commercial" will likely confuse rather than clarify the standards. In other contexts, this Court has repeatedly recognized the benefits of awaiting suit by an individual suffering actual injury, so that "the scope of the controversy [will be] reduced to more manageable proportions, and its factual components fleshed out, by some concrete action." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990); see *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58-59 (1993) (noting, for similar reasons, that mere passage of a statute and issuance of regulations do not give a complainant a ripe claim absent agency action "applying the regulation to him"). Reaching the commercial speech issue in this abstract context raises serious risks of unintended consequences.

For example, in an effort to create breathing room for speech on matters of public concern, Nike appears broadly to suggest that speech is not commercial unless it addresses the "characteristics of Nike products," Pet. 13—by which Nike presumably means the "purpose, safety, efficacy, or cost of the product or service,' its 'durability, performance, warranties or quality,'" *Novartis*, 223 F.3d at 786 (quoting FTC Policy Statement, *Cliffdale*, 103 F.T.C. at 182)—and cannot encompass representations concerning Nike's means of production made in what the company characterizes as a broader debate on more general matters of public concern, Pet. 14-15.

Whatever the usefulness of that sort of categorization in the context of this case, it has little application—and could cause significant mischief—if applied elsewhere. In today's environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more to achieve desirable environmental or social ends. Thus, the FTC would undoubtedly be empowered to bring an action against, for example, a coffee grower that represented that it employed rain-forest-protective practices or a tuna producer that represented its tuna as "dolphin safe" if, in fact, those representations were false. Such representations are material to many consumers and can induce reliance. Although those representations say nothing about the actual quality of the product and deal with production practices thousands of miles away, they nevertheless influence consumer choice and allow sellers to command premiums from consumers who are willing to pay more to protect rain forests or marine mammals.[13]

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[13] Furthermore, such statements, if false, may be actionable even if they appeared in the context of advertisements addressing a matter of public concern, such as sound forest or ocean management. Consumers derive information on products from a variety of sources, and this Court has correspondingly refused to "grant broad constitutional protection to any advertising that links a product to a current public debate," since "many, if not most, products may be tied to public concerns." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980). See, *e.g.*, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983); *Standard Oil* v. *FTC*, 577 F.2d 653, 659 (9th Cir. 1978) ("when discussion of a matter of public concern becomes a vehicle for sale of a product, the representations which bear on the characteristics of the product may take on increased importance in the mind of the public, and it is appropriate for the [FTC] to consider this factor in determining whether the advertising is misleading or deceptive") (Kennedy, J.). The forum for such statements is simply not dispositive. For example, if a manufacturer who markets rain-forest-friendly coffee falsely extols the

In this instance, Nike's customers may, or may not, place reliance on the company's statements respecting the working conditions in its production facilities. That inquiry would be crucial if Nike's statements were the subject of a traditional private action for misrepresentation or a government enforcement action. But those statements are instead the subject of a peculiar species of suit that avoids that inquiry and, in the process, runs afoul of the First Amendment. Because it is precisely the unconstitutional aspects of respondent's suit that prompt the difficult questions concerning "commercial speech," the Court would be wise to leave those questions for another day. Rather, the Court should rule that the First Amendment bars private suits, such as respondent's, that challenge the truthfulness of representations that caused the plaintiff himself no harm.

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virtues of its environmental practices in an Earth Day op-ed, there is no reason those statements should be off-limits to a fraud action that otherwise meets the requirements of the common law. Just as the fact that the statements at issue in *Sullivan* came in a paid advertisement did not take them outside the protection of the First Amendment, the mere fact that material and fraudulent statements appear in an editorial forum should not take those statements wholly outside the law of fraud.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted.

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FEBRUARY 2003

(13)

Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

No. 02-575

In the Supreme Court of the United States

NIKE, INC., ET AL.,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF PETITIONERS

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43 pp
$10

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American Law Institute, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260-64 (1991); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 U. VA. L. REV. 139 (1986) 20

Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) 14

Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19 (1993) 26

Margaret M. Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275 (1999) 28

McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for California Consumers—Fluid Recovery, Consumer Trust Funds, and Representative Actions* (1995) 46 *HAST. L.J.* 797 7

Monte Morin, *Lawyers Who Sue to Settle*, *LOS ANGELES TIMES*, Oct. 26, 2002, Pt. 1, p. 1 6

Robert Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 CAL. REGULATORY L. RPTR.,1 (1995) 4

Thomas M. Cooley, CONSTITUTIONAL LIMITATIONS (1868) 28

Unfair Competition Litigation, 26 *CAL. L. REVISION COMM'N REPORTS* 191 (1996) 5-6, 18

INTEREST OF AMICUS[1]

The Civil Justice Association of California ("CJAC") is a twenty-five-year-old nonprofit organization whose membership is made up of hundreds of businesses, professional associations and local governments. Our principal purpose is to educate the public about ways to improve civil liability laws in terms of fairness, efficiency, economy and certainty. Toward these ends, CJAC regularly petitions the government – the judiciary, the legislature and, through the initiative process, the people themselves – for redress of laws concerning who pays, how much, and to whom when wrongful conduct is charged.

California's Unfair Competition Law ("UCL") has figured prominently in CJAC's efforts to restore some semblance of fairness and sanity to the scope and application of liability laws. Amended 60 years ago to codify the common law tort of "unfair competition," it has – largely from an expansive reading of its capacious language by courts – become a major source of unfairness to those ensnared by its ban on "business practices" deemed "unlawful, unfair or fraudulent . . .

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[1] All monetary contributions toward the preparation of this brief were made by CJAC; and the brief was written by CJAC's counsel and not at all by Nike, Inc. The brief is submitted pursuant to Rule 37 of the Rules of this Court, both petitioner and respondent having consented to its filing by letters filed with Clerk of the Court.

[or] unfair, untrue or misleading advertising." (Cal. B & P Code § 17200.)[2]

CJAC participated as amicus curiae in support of petitioner Nike, Inc. in the California Supreme Court and in urging this Court to grant certiorari from the decision because it impermissibly chills the rights of those who wish to publicly defend themselves against unfair attacks on their business practices. We argued that when, as here, it comes to publicly uttered statements by a company defending itself against charges that its overseas subcontractors are violating the laws of the countries in which they operate, the constitutional guarantee to freedom of expression trumps the ban of the UCL against false or misleading advertising. We now explain why prosecution under the UCL violates due process and other constitutional guarantees.

INTRODUCTION AND SUMMARY OF ARGUMENT

California's UCL impairs a number of due process and other constitutional rights beyond the First Amendment claim on which this Court granted review. These rights include the absence of adequate notice to those charged with violating it, repetitive punishment of defendants for the same acts, impermissible delegation of

[2] All code section references are, unless otherwise described, from the California Business and Professions Code.

governmental power to private parties, and extraterritorial reach of state regulation.

The UCL engenders these questions because, as applied and construed, it is an open-ended license to file abusive litigation. To those harboring social reform or entrepreneurial instincts, the siren call of the UCL is its broad definition of "unfair competition," a wrong described in the statute as any "unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising . . . ." (§ 17200.) The California Supreme Court has explained the Legislature intended this "sweeping language" to ban "anything that can properly be called a business practice and that at the same time is forbidden by law." (*Barquis v. Merchants Collection Assn.*, 7 Cal. 3d 94, 111 (1972) (citation omitted).) Later the court diffused this definition further by dropping the requirement of "illegality" and explaining that the UCL prohibits conduct that, though perfectly legal, may still be "unfair."[3]

Equally disturbing is the lack of *finality* to UCL litigation. A new and different plaintiff, purportedly acting on behalf of the same "general public," may sue the same defendant for the same activity resolved in a

[3] *Cel-Tech Communications v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163 (1999). *See also Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App.3d 432, 448 (1998) (test under Section 17200 is that "practice merely be unfair"; actual fraud need not be shown).

previous UCL suit. Case after case can be brought under the UCL for the same conduct against the same defendant. According to a study by the state's Law Revision Commission, this makes the California law unique. "No statute of which we are aware in this state or nation confers the kind of unbridled standing to so many without definition, standards, notice requirements, or independent review . . . . [I]t is unclear who can sue for whom, what they have to do, whether it is final, and as to whom." (Robert Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's on First?*, 15 CAL. REGULATORY L. RPTR., 1, 11 (1995).)

A major incentive for the UCL's assertion by potential plaintiffs is its dispensation from any requirement of "standing." No one, in fact, need suffer any concrete harm from, or be deceived by, the complained of conduct in order to sue under the UCL. A gripe against someone for something is, as this case shows, sufficient to bring a UCL suit and survive a challenge to standing.[4] If successful – and "success" in a

[4] As the appendix to this brief demonstrates, the claim asserted by the plaintiff in this case could not be brought under the analogous laws of any other state. Other states require proof of individualized harm or reliance for *private* enforcement actions under their unfair competition or false advertising laws, but relax that requirement when suit is brought by a public prosecutor. See, e.g., Colo. Code § 6-1-
(continued...)

UCL action may well be a settlement by defendant to avoid the cost of protracted litigation – a plaintiff may also recover a court-awarded attorney's fee for having vindicated the "public interest,"[5] a requirement partially satisfied by merely claiming that the suit was brought "for the interests of . . . the general public." (§ 17204.) The UCL does not provide "any mechanism to distinguish among" plaintiffs with genuine business disputes, "'true' private attorney[s] general," and those who use the law as a means of leveraging settlements for "tactical advantage" at the expense of the public interest. (*Unfair Competition Litigation*, 26 *CAL. L. REVISION*

[4](...continued)
113, *Hall v. Walter*, 969 P.2d 224, 235 (Co. 1998) (en banc), *May Dept. Stores Co. v. State*, 863 P.2d 967, 972-73 (Co. 1993) (en banc); Fla. Code Ann. §§ 817.41, 501.204, *Himes v. Brown & Secs. Corp.*, 518 So. 2d 937, 938 n.1 (Fla. Dist. Ct. App. 1987) (per curiam). Some states restrict enforcement of their unfair trade practices laws to public prosecutors (Iowa Code § 714.16(7); Minn. Stat. §325F.67), while others limit restitutionary relief under their laws to actions brought by the Attorney General. E.g, Alaska Stat. § 45.50.501(b); Ohio Rev. Code Ann. § 1345.07(F).

[5] If a plaintiff prevails in an unfair competition law claim, it may seek attorney fees as a private attorney general pursuant to Cal. Code of Civil Procedure section 1021.5. There is no provision for such a right for a successful defendant.

COMM'N REPORTS 191, 207 (1996).) "This invites 'blackmail' suits." (*Id.* at 208; citation omitted.)[6]

The UCL is also completely different from federal statutes such as the Federal Trade Commission Act,[7] upon which most state unfair competition and false advertising laws are modeled. The FTC Act provides *no* private remedy. (*See Pan American World Airways v. United States*, 371 U.S. 296, 306 (1963); *Alfred Dunhill, Ltd. v Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974); *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986, 988-92 (D.C. Cir. 1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).) Instead, the FTC Act authorizes suits *by the Commission* for injunctions and restraining orders, 15 U.S.C. § 53, and suits *by the Commission* for dishonest or fraudulent acts. (*Id.* at § 57b.)

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[6] The inevitable consequence of marrying the omnivorous UCL with ambitious lawyers desirous of reaching out and touching someone with a lawsuit to obtain an attorney fee is aptly described by a front page newspaper article. "They blanket the business world with hundreds of lawsuits at a time, often making claims that appear fanciful, even absurd. Most of the cases never get to trial. The lawyers make their money on settlements paid by defendants who just want to make the suits go away. The amounts typically are modest – from $2,000 to $50,000 – but they add up." (Monte Morin, *Lawyers Who Sue to Settle*, *LOS ANGELES TIMES*, Oct. 26, 2002, Pt. 1, p. 1.)

[7] 15 U.S.C. §§ 41-58.

The unprecedented nature of the UCL in these respects makes its constitutionality suspect. (*See, e.g.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 427, 430 (1994) (holding Oregon procedure invalid under Due Process Clause where "[e]very other State in the Union" has adopted different procedure and "Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause").)

STATEMENT OF THE CASE

Respondent Marc Kasky, a self-appointed representative of the public on whose behalf he brings suit,[8] claims that utterances by "just do it" athletic shoe maker Nike are "fraudulent" under the UCL. These statements were made by Nike in press releases and letters to the editor when it sought to defend itself against charges by its critics concerning the wages, hours, and working conditions in its subcontracted Asian shoe factories.

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[8] Cal. B & P C § 17204, which specifies who can bring UCL suits, "has been interpreted by the . . . Court to authorize standing for *any person or organization* to sue to enjoin an unfair practice, regardless of whether the person or organization has suffered injury as a result of the practice." McCall, Sturdevant, Kaplan & Hillebrand, *Greater Representation for California Consumers–Fluid Recovery, Consumer Trust Funds, and Representative Actions* (1995) 46 *HAST. L.J.* 797, 814-815 and authorities therein cited. (Italics added.)

The gravamen of the complaint is that "Nike's athletic shoes are made in overseas sweatshops," but there is no attempt in this UCL action to get directly at those "sweatshops" in the countries where they operate. Neither does respondent claim the UCL prohibits Nike from contracting with overseas companies who are in violation of their own country's laws on wages and working conditions. He has not, so far at least, attempted to "bootstrap" the violation of applicable foreign law by a Nike subcontractor onto the "unlawful" or "unfair" prongs of the UCL and thereby get at Nike in California, an approach which, if successful, would convert California courts applying the UCL into international ombudsmen, and jettison long established principles of national sovereignty and international law.

What respondent cannot accomplish directly by getting at the conduct to which he objects, however, he has so far achieved indirectly by getting at the "speech" given in defense of that conduct. This "indirection" is achieved by use of the "fraudulent" prong of the UCL against Nike because it contracts with foreign companies allegedly violating their own countries' labor laws. By categorizing Nike's statements in defense of its business dealings with its overseas subcontractors as "commercial speech," respondent claims, and a majority of the state's highest court agrees, that expression is subject to regulation in the form of UCL liability.

Now, it has long been a cornerstone of First Amendment jurisprudence that just because government can abolish an activity does not mean that it can suppress "speech" concerning that activity.[9] While creation of the "commercial speech" category has resulted in occasional backsliding from this principle,[10] respondent and California's high court have stood it on its head—*i.e.*, while state law can do nothing directly about the objected to conduct of foreign "sweatshops," the UCL imposes liability on any speech in defense of these charges which is "misleading or false."

If this seems a bit of an overstatement, it is not. The UCL does not define what is a "business practice," but it is clear it can be a single past act and is likely as broad as the business practices that come within the sweep of the Unruh Civil Rights Act, Cal. Civ. C. §51: "[e]verything about which one can be employed," and "synonymous with calling, occupation, or trade engaged in for the purpose of making a livelihood or gain."[11]

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[9] See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968) (though school board may terminate from employment a non-tenured teacher for no reason whatsoever, it cannot fire her for writing a letter to the editor of which it disapproved.).

[10] See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345 (1986).

[11] *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 468

(continued...)

Carried to the limits of its logic, respondent's position, sanctioned by the state supreme court, permits maintenance of a UCL action against a newspaper that "misleadingly" defends the labor practices of Nike's Asian subcontractors. After all, publication of the "misleading" article, editorial or advertisement would be done in the course of the newspaper's business practice. It would undoubtedly be in furtherance of a "commercial transaction," i.e., selling the newspaper to readers and the advertisement to those who pay to run it. Ironically, a boycott of Nike goods by respondent and those who wish to bring pressure on Nike to improve its foreign subcontracting business is protected by the First Amendment[12] but, according to California's high court, a rebuttal to that boycott must be judicially monitored under the UCL for its truthfulness.

Respondent and the narrowest majority possible of the California Supreme Court would, in other words, have the government instead of the public act as arbiter of what is "true" and "false" in public debate over compliance by foreign subcontractors with the laws of the countries where they do business. This is not a role the constitution favors for government. "[Authoritative]

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[11](...continued)
(1962).

[12] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (economic boycott by civil rights organization protected by First Amendment).

interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker."[13]

Unless this Court reverses the decision below, those who do business in California will be subject to government regulation through this strict liability law for publicly defending their business practices. This is an *in terrorem* means of regulation because the UCL is unprecedented in terms of the breadth of its scope, its absence of any standing requirements and the lack of finality in its application. Accordingly, the UCL raises grave constitutional questions, even apart from the First Amendment.

ARGUMENT

I. THE UCL VIOLATES DUE PROCESS BECAUSE IT FAILS TO PROVIDE ADEQUATE NOTICE OF PROHIBITED CONDUCT.

The UCL authorizes potentially massive civil liability even when a defendant's conduct is not contrary to existing state statutes or judicial decisions, and even when the defendant has no notice of his potential liability.

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[13] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964).

The elements of a violation under the UCL are amorphous and elastic. "Unfair" simply means any practice "whose harm to the victim outweighs its benefits." (*Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994).) Whatever that may mean as an intelligible guide to one's future conduct, conformity to law does not satisfy it. An unfair practice may be deemed actionable even if it is not unlawful. This "weighing" of benefits and harms is a squishy calculus, utterly devoid of any "bright line" standard for determining what is allowed and what is forbidden. Indeed, this "unfair" test raises more questions than it provides answers, a principal one being, "Who counts as a 'victim' and how is 'harm' to be 'weighed' when no 'harm' or 'actual injury' is required to bring suit under the UCL?"

"Fraudulent," the prong in the UCL upon which respondent rests his case, does not, we have seen, "refer to the common law tort of fraud, but only requires a showing that members of the public are likely to be deceived." (*Saunders, supra.*, 27 Cal. App. 4th at 839; citation omitted.) Thus neither the plaintiff nor any real person need actually be deceived or rely upon the challenged statements. In fact, as with the prohibition against misleading advertising under the UCL, the ban on engaging in a "fraudulent business practice" extends to misleading representations that are quite literally true. (*Committee on Children's Television v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983).) In 1992, the

Legislature overruled precedent limiting the statute's application to cases of multiple transactions.[14] Thus, even a single episode of past conduct that is "likely to deceive" if repeated may give rise to liability.[15]

"Unlawful" under the UCL means conduct or, in this case, "speech" in violation of *any* law – whether federal, state or local – including statutes, regulations, ordinances and even court rules. (*See Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 533 (1997).) Should any law from this seemingly bottomless compendium expire for going beyond its own limitations period, the UCL can, by giving it a "toehold" to its unlawful prong, revive and extend it up to four years. (*Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 178-179 (2000).) Never fear that the plaintiff lacks standing under the "predicate" law to sue the defendant, because by "bootstrapping" the predicate statute to the UCL's "unlawful" prong a plaintiff can strip away that otherwise troubling "standing" barrier. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal.App.3d 1377, 1393 (1990); *Consumers*

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[14] *See State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1169-117 (1988) (" 'practice' requirement envisions something more than a single transaction").

[15] *See Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th 553, 570 (1998); *United Farm Workers of America, AFL-CIO v. Dutra Farms*, 83 Cal. App.4th 1146, 1163 (2000).

Union of the United States, Inc. v. Fisher Development, Inc., 208 CalApp.3d 1433, 1443-1444 (1989.)

This case illustrates the abusive nature of the UCL. There is no way Nike could, from reading the UCL, have reasonably known that defending itself publicly and denying charges it contracted with overseas sweat shops would make it strictly liable to anyone who disagreed with those statements. Any person can, like Nike, find itself subject to crushing liability under the UCL with no prior notice that its conduct was unlawful. This prospect offends the basic due process principle that a defendant must be afforded fair notice of what is prohibited. "It is scarcely consistent with ordered liberty that the amenability of an individual to punishment should be judged solely upon the sum total of badness or detriment to the legitimate interests of the state which can be found, or inferred, from a backward looking appraisal of his trial record."[16]

This Court has held that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." (*Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).)

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[16] Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 81 (1960).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

(*Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality) (invalidating municipal anti-loitering ordinance because "the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law").)

The vagueness doctrine is not limited to criminal penalties.[17] In *Giaccio v. Pennsylvania*, 382 U.S. 399, 402

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[17] *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, (continued...)

(1966), this Court expressly repudiated any distinction between civil and criminal measures for purposes of the vagueness doctrine.[18] In the punitive damages context, for example, this Court has held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996).)

The vice of a vague law is particularly pernicious when, as here, the conduct upon which it seeks to impose liability is intertwined with expression that is constitutionally protected. "[E]rroneous statement is

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[17](...continued)
455 U.S. 489, 498-99 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 290 (1982) ("[T]he definition of 'connections with criminal elements' in the city's ordinance is so vague that a defendant could not be convicted of the offense of having such a connection; we may even assume, without deciding, that such a standard is also too vague to support the denial of an application for a license to operate an amusement center.").

[18] *See* 382 U.S. at 402 ("Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague.").

inevitable in free debate," [and error, too,] "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " (*New York Times v. Sullivan*, *supra*, 376 U.S. at 272-273.) Courts apply strict scrutiny to vague laws that impinge on free expression. (*Burson v. Freeman*, 504 U.S. 191, 198 (1992).) "Objections to vagueness under the Due Process Clause rest on the lack of notice . . . Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand . . .." (*Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).) "We have been especially intolerant of vague statutes in the First Amendment area." (*Pope v. Illinois*, 481 U.S. 497, 515, fn. 8 (1987)(dissenting opinion by Justice Stevens).)

The UCL violates this bedrock principle of due process. It fails to provide constitutionally adequate notice of prohibited conduct or to provide proper standards confining the discretion of enforcing courts.

II. THE UCL VIOLATES DUE PROCESS BY CREATING AN IMPERMISSIBLE RISK THAT DEFENDANTS WILL BE SUBJECT TO REPETITIVE SUITS FOR THE SAME CONDUCT.

The UCL creates an impermissible potential for multiple, repetitive suits by interlopers seeking to sue on the behalf of victims of perceived illegality. "The potential for a multiplicity of actions under the unfair competition law and overlapping or parallel proceedings is troublesome. Some commentators have termed this prospect the 'two-front' war. This situation can result because there is no limitation on multiple plaintiffs seeking relief for the same injury to the general public." (*Unfair Competition Litigation*, 26 CAL. L. REVISION COMM'N REPORTS at 209 (footnote omitted).)

Allowing multiple plaintiffs repetitively to punish a defendant's unitary course of conduct fundamentally conflicts with what this Court long ago called "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.*" (*Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1874).)[19]

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[19] This issue is related to the question of multiple punishment presented in *State Farm Mut. Automobile Ins. Co. v. Campbell*, No. 01-1289 (U.S. S. Ct., pending).

Although the Double Jeopardy Clause is limited to criminal penalties, numerous courts have indicated that repetitive civil judgments for the same misconduct violates due process. Judge Henry Friendly is one of the most prominent jurists who holds this viewpoint. (*See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967) (Friendly, J.).) In *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989), for example, the court concluded that "due process places a limit on the number of times and extent to which a defendant may be subjected to punishment for a single course of conduct. Regardless of whether a sanction is labelled 'civil' or 'criminal' in nature, it cannot be tolerated under the requirements of due process if it amounts to unrestricted punishment." (*Id.* at 1064.) "Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs." *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).[20]

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[20] *See In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J. dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would

(continued...)

The UCL creates an impermissible risk of repetitive punishment because there is no finality to that litigation. A suit by one plaintiff does not prevent another self-appointed "private attorney general" from suing the same defendant on precisely the same theory. UCL suits are not class actions.[21] California courts have

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[20](...continued)
violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (Weinstein, J.), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *see also Dunn v. HOVIC*, 1 F.3d 1371, 1385-87 (3d Cir.), *cert. denied*, 510 U.S. 1031 (1993); *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir. 1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990); *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984) (*Jackson I*); 750 F.2d 1314 (5th Cir. 1985) (*Jackson II*);781 F.2d 394 (5th Cir. 1986) (*Jackson III*); *Sealover v. Carey Canada*, 793 F. Supp. 569, 582 (M.D.Pa. 1992); American Law Institute, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260-64 (1991); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 U. VA. L. REV. 139 (1986).

[21] *See Kraus v. Trinity Management Services, Inc.*, 23 (continued...)

held that nonparties cannot be bound to prior judgments involving UCL claims by different plantiffs. (*See Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 717 (1989).) Accordingly, the UCL violates the due process right of defendants to be free from multiple, repetitive punishment for the same course of conduct.

III. THE UCL IMPERMISSIBLY DELEGATES GOVERNMENTAL POWER TO PRIVATE PERSONS.

Ordinarily, states are free to create their own standing rules. (*See ASARCO v. Kadish*, 490 U.S. 605, 617 (1989).) The UCL, however, does something quite different when it obliterates any semblance of a standing requirement – it turns over the machinery of state government to politically unaccountable private plaintiffs acting as bounty hunters. The plaintiff in this

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[21](...continued)
Cal. 4th 116 (2000); *Dean Witter Reynolds, Inc. v. Superior Court*, 211 Cal. App. 3d 758, 773 (1989) ("The court in such a suit is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action," even though "[a]bsent persons generally are not bound by a judgment unless they were in privity with a party and the adjudication of their rights comports with due process."); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 661 (1993) ("In a suit arising under Business and Professions Code section 17200 et seq., the court 'is empowered to grant equitable relief, including restitution in favor of absent persons, without certifying a class action.' " (citation omitted)).

case, who is acting essentially as a professional litigant, demonstrates the danger created by the UCL. "[P]ursuant to section 17200 as construed by this court and the Courts of Appeal, 'a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others.'" (*Stop Youth Addiction v. Lucky Stores*, *supra*, 17 Cal. 4th at 561.) In *Stop Youth Addiction*, for example, the California Supreme Court held a private person may sue to enforce penal laws even where the Attorney General and law enforcement officials oppose the suit.

Under the UCL, any unelected, unaccountable social engineer or gadfly can prosecute the law independent of the Attorney General or District Attorneys. State administrative and criminal law is transformed by the UCL into a body of civil law giving rise to private causes of action. Defendants cannot protect themselves even if they enter into agreements or consent decrees with the Attorney General and other governmental officials. As this Court has opined, *qui tam* relators have "different incentives" from the government, which usually involve money "rather than the public good." (*Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949-50 (1997).) The same is true of UCL plaintiffs.

Moreover, the UCL authorizes a private person to sue even if the substantive cause of action does not. The UCL borrows violations of other laws and treats

them as independently actionable unlawful practices. The "unlawful" practices prohibited are "any practices forbidden by law -- be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement." (*Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002).)

"[E]ven though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the Business and Professions Code." (*People v. McKale*, 25 Cal. 3d 626, 632 (1979).) "Virtually any law -- federal, state or local -- can serve as a predicate for an action under Business and Professions Code, section 17200." (*Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 718 (2001).)[22]

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[22] *See, e.g., Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299, n.6, (1993), *review denied*, 1993 Cal. LEXIS 6487 (Cal. Dec. 16, 1993), *cert. denied*, 511 U.S. 1084 (1994) (recognizing right of private plaintiff to sue to enjoin acts made unlawful by the Knox-Keene (HMO licensing) Act); *Committee on Children's Television, Inc. v. General Foods Corp.*, *supra*, 35 Cal. 3d at 210-11 (unfair competition action available to remedy cereal adulteration and misbranding, despite existence of criminal penalties under Sherman Law); *Rubin v. Green*, 4 Cal. 4th 1187, 1204 (1993) (unfair competition action proper to remedy improper solicitation of litigation clients, notwithstanding existence of "additional sanctions against attorney solicitation" available

(continued...)

The UCL thus raises two related constitutional questions. First, permitting private plaintiffs to enforce *federal statutes* that do not contain private rights of action raises a serious issue of separation of powers. It usurps the congressional prerogative of deciding whether to include a private remedy as an appropriate enforcement mechanism. It also " 'impermissibly undermines' the powers of the Executive" with respect to the public enforcement of federal law. (*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986).) This Court has opined that converting "the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take care that the Laws be faithfully executed,' Art. II, § 3." (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).) "It would enable the courts . . . 'to assume a position of authority over the governmental acts of another and co-equal department,' and to become 'virtually continuing monitors of the wisdom and soundness of Executive action.' " (*Id.*; citations omitted.)

Second, permitting UCL plaintiffs to enforce *state* law gives rise to serious federal constitutional questions. This Court has long condemned the delegation to

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[22](...continued)
to "the State Bar and prosecutorial authorities").

private plaintiffs of a power obviously governmental in character, particularly when the delegation is made to someone in an adverse position to the aggrieved party. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." (*Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (striking down statute delegating power to private persons to draw up regulatory codes); *cf. Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973) (plaintiff may not be required to exhaust an administrative remedy that is in the hands of a board composed of his potential competitors); *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972) (replevin statutes allowing private parties to repossess property based on ex parte averments impermissibly "abdicate effective state control over state power"); *Eubank v. Richmond*, 226 U.S. 137 (1912) (invalidating city ordinance which conferred power to establish building setback lines upon the owners of two-thirds of the property abutting any street).)

In fact, for a state government to abdicate the basic machinery of law enforcement to private plaintiffs would raise questions under the Republican Form of Government Clause, Article IV, § 4, because it would eliminate politically accountable leadership responsible for lawmaking and law enforcement responsibilities. The UCL eliminates the ability of citizens to hold state government officials accountable for prosecutorial

decisions regarding the manner in which state laws are enforced.[23]

IV. THE UCL IMPOSES IMPERMISSIBLE EXTRATERRITORIAL REGULATION.

The UCL also raises serious constitutional questions because it extends California law extraterritorially to cover nationwide business conduct. Section 17200 was amended a decade ago to clarify that it authorized injunctive relief against out-of-state conduct. In *Yu v. Signet Bank/Virginia*, 69 Cal. App. 4th 1377, 1392 (1999), for example, the court held that California residents could invoke the UCL to sue a Virginia bank under California law on the basis of the bank's allegedly unfair practice of suing its out-of-state credit card holders in Virginia. The court held that

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[23] *See* Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 Or. L. Rev. 19, 33-45 (1993). Although claims under the Clause have traditionally been regarded as non-justiciable, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (choice between rival state governments is for Congress, not the courts), in *New York v. United States*, 505 U.S. 144 (1992), this Court has suggested that the Clause might be interpreted as conferring judicially cognizable rights, although it indicated that "[w]e need not resolve this difficult question today." (*Id.* at 185.) The Court noted that the challenged law did not violate the Republican Form of Government Clause because "state government officials remain accountable to the local electorate." (*Id.*) The UCL, in contrast, eliminates such accountability.

whether the practice might be entirely lawful in Virginia was irrelevant on the supposed ground that California could "punish the conduct of an out-of-state defendant if it has an impact on [plaintiffs] regardless of whether the conduct might be lawful elsewhere." (*Id.*)

Indeed, in this case, Nike's speech was hardly confined to California. Yet the California courts have shown no interest in confining their application of the UCL to California's borders. California's assertion of nationwide regulatory jurisdiction violates the dormant Commerce Clause[24] and principles of federalism.

For example, in *White v. Ford Motor Co.*, 2002 WL 31687641 (9th Cir. Dec. 3, 2002), the Ninth Circuit held a California punitive damages award could not be based on out-of-state sales of allegedly defective pick-up trucks, even if the trucks qualified as "defective" under the product liability laws of every relevant jurisdiction. *White* followed this Court's decision in *BMW v. Gore*, *supra*, 517 U.S. 559, which held, based on "principles of state sovereignty and comity," "punitive damages may not be imposed to punish lawful conduct in other States." (*Id.* at 572.) The power of each State is

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[24] The "dormant Commerce Clause" invalidates state laws that unduly burden interstate commerce, which Congress is authorized to regulate by Article I. See generally *Pike v. Bruce Church*, 397 U.S. 137 (1970) (invalidating a state official's order regarding cantaloupe packaging as burdensome on interstate commerce).

"constrained by the need to respect the interests of other States" because no single State has the authority to impose "policy for the entire nation, . . . or even impose its own policy choices on neighboring States." (*Id.* at 517.) This issue is related to the question of extraterritorial punishment presented in *State Farm Mut. Automobile Ins. Co. v. Campbell*, No. 01-1289 (U.S. S. Ct., pending). Lower courts have recognized these principles prohibit punishing out-of-state conduct even where it is unlawful where it occurs.[25]

It has long been settled that each State "can legislate only with reference to its own jurisdiction." (*Broderick v. Rosner*, 294 U.S. 629, 643 (1935).) "The legislative authority of every State must spend its force within the territorial limits of the State." (Thomas M. Cooley, CONSTITUTIONAL LIMITATIONS 127-28 (1868).) "Laws have no force of themselves beyond the

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[25] *See Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996) ("[W]e read the [*BMW*] opinion to prohibit reliance upon inhibiting unlawful conduct in other states."); *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999); *Ace v. Aetna Life Ins.*, 40 F. Supp.2d 1125, 1133 (D. Alaska 1999); *see also* Margaret M. Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 308 (1999) ("When one state imposes punitive damages, using its own substantive and procedural standards for awarding punitive damages, based on the defendant's extraterritorial conduct, that state projects its own regulatory choices regarding punitive damages onto other states.").

jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states." (*Huntington v. Attrill*, 146 U.S. 657, 669 (1892).) "No State can legislate except with reference to its own jurisdiction." (*Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).) Thus, a State may not regulate conduct in other State "merely because the welfare and health of its own citizens may be affected when they travel" to that State. (*Bigelow v. Virginia*, 421 U.S. 809, 823-24 (1975).)

This Court held the dormant Commerce Clause also prevents States from regulating outside their borders. (*See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("States and localities may not attach restrictions to exports or imports in order to control commerce in other states."); *Healy v. Beer Institute*, 491 U.S. 324 (1989) (striking down law requiring out-of-state beer shippers to affirm competitiveness of prices for state residents); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 583 (1986) (similarly ruling with respect to New York liquor price affirmation law); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (striking down law allowing Illinois Secretary of State to evaluate fairness of any takeover offer for the shares of an Illinois company regardless of residency of shareholders); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (invalidating Arizona train law governing length of trains in state as disruptive of interstate commerce).)

The UCL offends these principles. It projects California law extraterritorially by authorizing California courts to punish conduct or speech that offends the UCL's vague provisions no matter where it occurs. It does not matter whether the conduct challenged is perfectly legal under the law of the defendant's domicile or under the law of the forum where the conduct occurs. So long as a California court can identify a jurisdictional basis, it is apparently free to override the prerogatives of sister States by applying the UCL. Such global extension of California law outside the State's borders raises serious constitutional questions under the dormant Commerce Clause and principles of federalism.

CONCLUSION

For all the aforementioned reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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February 28, 2003

APPENDIX A

Unfair Trade Practice Laws and False Advertising Laws

Chart I: Assessing the Reasons Why Kasky's Claim Would Fail in Each Respective State

State	Unfair Trade Practice Law	False Advertising Law
Alabama	**No injury;** Monetary damage to consumer is required - private right of action depends on whether plaintiff suffered any monetary damages as a result of the defendant's actions. See, Billions v. White & Stafford Furn. Co., 528 So. 2d 878 (Ala. Civ. App. 1988).	**No private action, no product reference** (the false or misleading statement must be made in connection with the promotion of a sale - § 13A9-42)
Alaska	**No injury (required for damages);** Harm (but not actual monetary damages) is required to recover damages under §45.50.531(a). **Not a "victim" (required for injunctive relief):** "any person who was the victim of the unlawful act, whether or not the person suffered actual damages, may bring an action to obtain an injunction." Alaska Stat. §45.50.535(a)	No separate FAL
Arizona	**No injury:** Arizona provides an implied private right of action for compensatory and punitive damages, *Dunlap v. Jimmy GMC, Inc.*, 666 P.2d 83, 87 (Ariz. Ct. App. 1983), and thus likely for injunctive relief as well. To state such a claim, the plaintiff must prove (1) a misrepresentation and (2) the plaintiff's consequent and proximate injury. *Id.*	**No private cause of action** (§44-1481, See, Ward v. Fireman's Fund Ins. Co., 152 Ariz. 211, (Ct. App. 1986). **No product reference** (must make misleading misrepresentation of the product - §44-1481(a)(1).)
Arkansas	**No injury;** "Any person who suffers actual damage or injury as a result of an offense or violation as defined in this chapter has a cause of action to recover actual damages, if appropriate, and reasonable attorney's fees." Ark. Code Ann. § 4-88-113(f)	No separate FAL
Colorado	**No injury; not an actual/potential consumer:** "An action under this section shall be available to any person who: Is an actual or potential consumer of the defendant's goods, services, or property and is injured as a result of such deceptive trade practice." Col. Gen Stat. **§6-1-113(1)(a)**	**No private cause of action** (criminal code - §18-5-301)
Connecticut	**No injury;** person "must suffer ascertainable loss of money or property as a result of the act or practice" of the company. Conn. Gen. Stat. §42-110g(a)	No separate FAL
Delaware	**No likelihood of injury:** only person "likely" to be damaged by a deceptive trade practice can bring suit. Title 6 Del Code Ann. §2533(a)	**No private cause of action** (criminal code - Del Code Ann. §906)
Florida	**No injury:** action must be "brought by a person who has suffered a loss as a result of a violation." Fla. Stat. Ann. §501.211(2)	**No private cause of action** (criminal code Fla. Stat. Ann. §817.40-47)
Georgia	**No likelihood of injury;** "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it ... Proof of monetary damage, loss of profits, or intent to deceive is not required." §10-1-373. **Injunction is only remedy:** *Id., See also, Lauria v. Ford Motor Co.*, 169 **Ga.** App. 203, 312 S.E.2d 190 (1983) (The "sole remedy provided under this section is injunctive relief.").	**No private cause of action** (criminal code §10-1-421)

Hawaii	**If no injury, only injunction available:** Hawaii amended its deceptive practices statute in June to allow "[a]ny person [to] bring an action based on unfair methods of competition." Haw. Stat. Ann. § 480-2(e). But the standing limits on seeking private remedies survive this amendment: only people "injured in [his or her] business or property," *id.* § 480(a), or suffering other "injur[y]," *id.* § 480-13(b) can take advantage of Hawaii's remedies.	**No private cause of action;** (criminal code Haw. Stat. Ann. §708-871) **No product reference;** "false advertising if in connection with the promotion of the sale" Haw. Stat. Ann. §708-871.
Idaho	**No purchase; no ascertainable injury**: "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by this act, may treat any agreement incident thereto as voidable or, in the alternative, may bring an action to recover actual damages." Idaho Code § 48-608(1).	No separate FAL
Illinois	**No injury;** "Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper." 815 ILCS § **505/10a.**	**No private cause of action** (criminal code 720 ILCS §2951/a)
Indiana	**No reliance; No injury;** "A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act." IC §24-5-0.5-3(a).	**No private cause of action** (criminal code IC 35-43-5-3)
Iowa	**No private cause of action;** act is enforced by AG (Iowa Code §714.16(15))	No separate FAL
Kansas	**No injury:** only a consumer who is "aggrieved by an alleged" deceptive act can bring suit – "Whether a consumer seeks or is entitled to damages or otherwise has an adequate remedy at law or in equity, a consumer aggrieved by an alleged violation of this act may bring an action." Kan. Stat. Ann. §50-634(a)	No separate FAL
Kentucky	**No injury; no purchase; no reliance**: "Any person who purchases ... goods or services ... and thereby suffers any ascertainable loss of money or property ... as a result ... of a method, act or practice declared unlawful ... may bring an action." Ky. Rev. Stat. Ann. §367.220	**No private cause of action** (criminal code Ky. Rev. Stat. Ann.§517.030)
Louisiana	**No financial injury; representative capacity not allowed:** "Any person who suffers any ascertainable loss of money or movable property... as a result of ... an unfair or deceptive method... may bring an action individually but not in a representative capacity to recover actual damages." § La. R.S. 51:1409(a)	No separate FAL

Maine	**No purchase; no injury;** Any person who purchases or leases goods... and thereby suffers any loss of money or property, ... as a result ... of a method, act or practice declared unlawful ... may bring an action ... for actual damages, restitution and for such other equitable relief, including an injunction." Me. Rev. Stat. Ann. tit. 5 §213). See also Me. Rev. Stat. Ann. tit. 10 §1213 (injunction only is available under this section)	**No private cause of action** (criminal code Me. Rev. Stat. Ann. tit. 17-A §901)
Maryland	**No injury:** "Any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title." Md. Code Ann. Comm. Law I § 13-408(a)	**Not material/no product reference;** "To determine if an advertisement is misleading, the following... shall be considered: (2) The extent to which the advertisement fails to reveal a fact which ... is material with respect to the advertised commodity." **No private cause of action** (criminal code, Md. Code Ann. Comm. Law I §11-704)
Massachusetts	**No injury; no causation:** Any person ... who has been injured by another person's use or employment of any method, act or practice declared to be unlawful ...may bring an action in the superior court... for damages and such equitable relief, including an injunction." 93A MGL §9(1)	**No private cause of action** (criminal code 266 MGL §91)
Michigan	**No injury;** "a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages" Mich. Stat. Ann. §445.911(2)	**No injury; no reliance** "a person who suffers loss as a result of a violation of this act ... may bring an individual or a class action to recover actual damages" Mich. Stat. Ann. §445.360(2)
Minnesota	**No injury/ likelihood of injury (injury is required when seeking damages, likelihood of injury is required for injunction)** See: *Group Health Plans v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001) and Minn. Stat. §325D.45 ("A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required.")	**Enforced by the AG:** "The duty of a strict observance and enforcement of this law and prosecution for any violation thereof is hereby expressly imposed upon the attorney general" – Minn. Stat. **§325F.67**
Mississippi	**No purchase; no injury;** "Any person who purchases or leases goods or services ... and thereby suffers any ascertainable loss of money or property, ... as a result ... of a method, act or practice prohibited by Section 75-24-5 may bring an action ... to recover such loss of money or damages for the loss of such property." Miss. Code. Ann. §75-24-15(1)	**No private cause of action** (criminal code Miss. Code. Ann. §97-23-1)

Missouri	**No purchase; no injury;** "Any person who purchases or leases merchandise ... and thereby suffers an ascertainable loss of money or property... as a result ... of a method, act or practice declared unlawful by section 407.020, may bring a private civil action ... to recover actual damages." Mo. Rev. Stat. § 407.025(1)	**No private cause of action** (criminal code Mo. Rev. Stat. §570.160)
Montana	**No purchase; no injury/loss** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, ... as a result of ... a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action." Mt. Stat. §30-14-133(1)	**No private cause of action** (criminal code Mt. Stat. §45-6-317)
Nebraska	**No injury:** "Any person who is injured ... may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him, or both." Neb. Rev. Stat. Ann § 59-1609. Only equitable relief is available under the Uniform Deceptive Trade Practices Act; money damages cannot be recovered. See Al'Amin v. McDonalds Corp., -- F. Supp. 2d --, 2001 U.S. Dist. LEXIS 14274, (D. Neb. 2001).	**No private cause of action** (criminal code Neb. Rev. Stat. Ann §28-1476)
Nevada	**Not a victim; no equitable relief:** " An action may be brought by any person who is a victim of consumer fraud. (3) If the claimant is the prevailing party, the court shall award him: (a) Any damages that he has sustained; and (b) His costs in the action and reasonable attorney's fees. Nev. Rev. Stat. Ann. §41-600(3)	**No private cause of action** (criminal code Nev. Rev. Stat. Ann. §207.171)
New Hampshire	**No injury:** "Any person injured by another's use of any method, act or practice declared unlawful under this chapter may bring an action for damages and for such equitable relief, including an injunction, as the court deems necessary and proper." N.H. Rev. Stat. §358-A:10(I)	**No private cause of action** (criminal code N.H. Rev. Stat. §638:6)
New Jersey	**No loss/injury:** "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of ... any method, act, or practice declared unlawful under this act or the act hereby amended and supplemented may bring an action ... in any court of competent jurisdiction." N.J. Stat. Ann § 56:8-19	No separate FAL

New Mexico	**No likelihood of injury (likelihood of harm required for injunction); equitable relief limited to injunction:** "A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required." §57-12-10(a). **No monetary loss (loss required for damages);** "Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages." N.M. Stat. Ann. § 57-12-10(b)	**Not material, no product mention.** (N.M. Stat. Ann. §57-15-2)
New York	**No injury;** "Any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice an action to recover his actual damages, or both." NY CLS Gen Bus §349(h)	**No private cause of action** (criminal code NY CLS Gen Bus **§190.20)**
N. Carolina	**No injury;** "If any person shall be injured ... by reason of any act or thing done ... in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done." N.C. Gen. Stat. §75.16	**No private cause of action** (criminal code N.C. Gen. Stat. **§14-117)**
N. Dakota	**No private cause of action:** See *Trade 'N Post, L.L.C. v. World Duty Free Ams.*, Inc., 2001 ND 116, 628 N.W.2d 707 (2001). (The state UTP (§51-10) does not contain a **private** right of action for damages for violations given the legislature's failure to expressly provide one).	**No injury;** See *Fargo Women's Health Org., Inc. v. FM Women's Help & Caring Connection*, 444 N.W.2d 683 (N.D. 1989) (One injured by a violation of the false advertising statutes (§51-12-01, 51-12-08) may bring an action to recover damages).
Ohio	**No likelihood of injury; only injunctive relief is available:** "A person who is likely to be damaged by a person who commits a deceptive trade practice ... may commence a civil action for injunctive relief." Ohio Rev. Code Ann. §4165.03(a)(1)	No separate FAL

Oklahoma	**No injury (injury required for damages):** "The commission of any act or practice declared to be a violation of the Consumer Protection Act shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer. Title 15 Okl. St. § 761.1(A) **No likelihood of injury (likelihood of injury required for injunction); equitable relief limited to injunction:** "Any person damaged or likely to be damaged by a deceptive trade practice of another may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such deceptive trade practice. Proof of actual monetary damages, loss of profits or intent shall not be required. If in such action damages are alleged and proved, the plaintiff, in addition to injunctive relief, shall be entitled to recover from the defendant the actual damages sustained by the person. 78 Okl. St. § 54(A) (2002)	**No private cause of action** (criminal code 21 Okl. St. §1502)
Oregon	**No injury/ascertainable loss:** "Any person who suffers any ascertainable loss of money or property ... as a result of ... a method, act or practice declared unlawful ... may bring an individual action in an appropriate court." §646.638(1)	No separate FAL
Pennsylvania	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... of a method, act or practice declared unlawful ... may bring a private action to recover actual damages." §201-9.2(a)	No separate FAL
Rhode Island	**No purchase/not a customer; no injury:** "Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of ... a method, act, or practice declared unlawful ... may bring an action." Or. Rev. Stat. 6-13.1-5.2(a)	**No private cause of action** (criminal code Or. Rev. Stat. §11-18-10)
S. Carolina	**No injury; no representative capacity** "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of ... an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. §39-5-140(a)	No separate FAL
S. Dakota	**No injury; no remedy available other than actual damages;** "Any person who claims to have been adversely affected by any act or a practice declared to be unlawful by § 37-24-6 shall be permitted to bring a civil action for the recovery of actual damages suffered as a result of such act or practice." S.D. Codified Laws §37-24-31	**No product reference** (statement must be "regarding merchandise"); **no private cause of action** (criminal code S.D. Codified Laws §22-41-10)

Tennessee	**No injury/ascertainable loss for actual damages:** "Any person who suffers an ascertainable loss of money or property, ... as a result of the use or employment by another person of an unfair or deceptive act or practice declared to be unlawful by this part, may bring an action individually to recover actual damages." Tenn. Code Ann. §47-18-109(a)(1) **Plaintiff must be "affected" to get injunction; no restitution is available:** "anyone affected by a violation of this part may bring an action ... to enjoin the person who has violated, is violating, or who is otherwise likely to violate this part. Tenn. Code Ann. §47-18-109(b)	**No private cause of action** (criminal code Tenn. Code Ann. §39-14-127)
Texas	**Not a consumer/no purchase; no injury; no reliance:** "A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish: (1) the use or employment by any person of a false, misleading, or deceptive act or practice that is... relied on by a consumer to the consumer's detriment." Texas Bus & Com Code §17.50(a)	**Not material; no product reference** ("A person commits an offense if ... he intentionally (12) [makes] a materially false or misleading statement in an advertisement for the purchase ... of property or service." §32.42(12)(a)) **No private cause of action** (criminal code)
Utah	**No loss suffered/injury (required for damages); no standing requirements for injunction; no restitution available:** "(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $ 2,000, whichever is greater, plus court costs. (3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter." (Utah Code Ann. §13-11-19(2)).	**No prior notice:** "Any person or the state may maintain an action to enjoin a continuance of any act in violation of [Utah's Truth in Advertising Act] and, if injured by the act, for the recovery of damages. ... (5) No action for injunctive relief may be brought for a violation of this chapter unless the complaining person first gives notice of the alleged violation to the prospective defendant and provides the prospective defendant an opportunity to promulgate a correction notice by the same media as the allegedly violating advertisement." (Utah Code Ann. §13-11A-4(a)) **Statements not advertising under act's definition:** ""Advertisement" means any written, oral, or graphic statement or representation made by a supplier in connection with the solicitation of business." (Utah Code Ann. §13-11a-2(a))

Vermont	**No reliance; no injury** "Any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by section 2453 ... or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by section 2453 of this title, ... may sue for appropriate equitable relief." 9 V.S.A. § 2461(b).	**No private cause of action** (criminal code 13 VSA §2005)
Virginia	**No injury/loss:** "Any person who suffers loss as the result of a violation of [UTP] shall be entitled to bring an individual action to recover damages. Va. Code Ann.§59.1-68.3	**No private cause of action** (criminal code Va. Code Ann. §18.2-216)
Washington	**No injury, no causal connection between injury and deceptive act:** "Any person who is injured in his or her business or property by a violation of [The UTP] ... may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both." (Rev. Code Wash. §19.86.090) See also *Northwest Strategies, Inc v. Buck Medical Servs., Inc.*, 927 F. Supp. 1343 (W.D. Wash. 1996) (The elements required to prove a violation of the UTP are: (1) defendant committed an unfair or deceptive act; (2) the act occurred in the conduct of trade or commerce; (3) the act has an impact on the public interest; (4) plaintiff's injury was caused by defendant's act). **No economic injury:** *See Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.2d 351, 359 (Wash. 2001) (en banc) (noting the need for individualized proof in statutory consumer fraud cases).	**No private cause of action** (criminal code Rev. Code Wash. §9.04.010)
W. Virginia	**No purchase, no ascertainable injury/loss:** "Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice prohibited or declared to be unlawful by the provisions of this article, may bring an action." § 46A-6-106(1).	No separate general FAL
Wisconsin	**No economic injury/loss:** "Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court ... and shall recover such pecuniary loss, together with costs." Wis Stat. §100.18 11(b)(2)	No separate FAL
Wyoming	**Not a consumer, no injury/damages; no reliance; no equitable relief:** "A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice." Wyo. Stat. Ann. §40-12-108(a)	**No private cause of action** (criminal code Wyo. Stat. Ann. §6-3-611)

(17)

No. 02-575

Supreme Court, U.S.
FILED
FEB 27 2003
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In The

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Petitioner, Nike, Inc., *et al.* Pursuant to Supreme Court Rule 37.3(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Mountain States Legal Foundation is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system.

Since its inception in 1977, MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion and assembly. For example, MSLF was a party in *Mountain States Legal*

[1] Counsel for Nike, Inc., *et al.*, have filed a "blanket" consent for the filing of *amici* with the Clerk of the Court and a copy of counsel for Kasky's consent to this brief has been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part, and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

Foundation v. Colorado, 946 P.2d 586 (Col. App 1997), counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), and filed an *amicus* in *Mulder v. National Labor Relations Bd.*, ___ U.S. ___, 123 S.Ct. 551 (Mem.) (2002). MSLF believes that its expertise in the area of First Amendment constitutional guarantees will assist this Court.

I. BACKGROUND

It is said among law professors that "hard cases make bad law." More accurately in this case, it could be said that "bad precedent makes for impossible decisions" speaking, of course, about the impossible, artificial, and arbitrary separation of commercial from non-commercial speech that has emerged as apparently dispositive in this case.

Of course, it has been this Court's view that the "First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout 'fire' in a crowded theater if there was no fire." *New York Times Co. v. U.S.*, 403 U.S. 713, 749 (1971), referring to Justice Holmes' opinion in *Schenck v. United States*, 249 U.S. 47, 52 (1919). Justice Holmes and the First Amendment might have fared better had he been in a position to take a lesson from Rothbard, however, who wrote "the problem here is *not* that rights cannot be pushed too far, but that the whole case is discussed in terms of a vague and woolly 'freedom of speech' rather

than in terms of the rights of private property."[2] As Rothbard points out in *For A New Liberty*:

> The fellow who brings on a riot by falsely shouting "fire" in a crowded theater is, necessarily, either the owner of the theater (or the owner's agent), [or] a paying patron, [or a trespasser]. If he is the owner, then he has committed fraud on his customers. . . . Suppose, on the other hand, that the shouter is a patron and not the owner. In that case, he is violating the property right of the owner as well as the other guests to their paid-for performance. As a guest, he has gained access to the property on certain terms, including an obligation not to violate the owner's property or to disrupt the performance the owner is putting on. . . . The fellow who maliciously yelled fire in a crowded theater is indeed a criminal but not because his so-called "right of free speech" must be pragmatically restricted on behalf of the "public good"; he is a criminal because he has clearly and obviously violated the property rights of another person.[3]

In the wake of Justice Holmes' regrettable theater analogy and its unfortunate blow to individual liberty and property rights, a persistent chipping away at the "absoluteness" of the First Amendment has ensued in the name of various criminal and commercial justifications despite the absolute nature of the Amendment's language: "Congress shall pass no law . . . abridging freedom of speech, or

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[2] Murray N. Rothbard, *For A New Liberty* 43 (rev. ed. 1978).

[3] *Id.* at 43-44.

of the press; of the right to peaceably assemble, and to petition the Government for a redress of grievances.'"[4]

It was, of course, not contemplated that such an absolute limitation on the power of the federal government over speech would have much relevance in the criminal law arena because, aside from the three constitutional crimes of treason (from which anti-sedition laws admittedly sprung), piracy on the high seas, and counterfeiting, such regulation was reserved expressly to the states, *inter alia*, by way of the Tenth Amendment and by the system of federalism recently discussed by Chief Justice Rehnquist.[5]

Neither was it contemplated that tying the hands of Congress in the area of speech would significantly impact commerce-related speech given that the federal government's role in commerce was limited to the express role of regulating foreign commerce and the Commerce Clause was still properly understood to be a limitation on discriminatory practices by a State favoring the economic activities of its citizens over the economic activities of citizens of neighboring states.[6] It was not until 1942 that

[4] U.S. Const. amend. I.

[5] In his 1998 Year-End Report on the Judiciary, Chief Justice William H. Rehnquist said the trend to federalize crimes traditionally handled in state courts not only is taxing the Judiciary's resources and affecting its budget needs, but it also threatens to change entirely the nature of our federal system. The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and, ultimately, whether we want most of our legal relationships decided at the national rather than local level.

[6] "The statute was held not to violate the commerce clause of the constitution of the United States, because it made no discrimination

(Continued on following page)

this Court gave Congress such "authority" as to exercise dominion and control over an Ohio wheat farmer who wanted little more than to feed wheat grown on his own property to the chickens with which he shared the land[7] and has now become the means by which the federal government interferes in some way with virtually every economic transaction.

Over time, more exceptions to the seemingly absolute language in the First Amendment have been accepted and, ironically, it was in the same year as the *Wickard v. Filburn*[8] decision that this Court decided *Valentine v. Chrestenson*, 316 U.S. 52 (1942), excluding, at least temporarily, all so-called "commercial speech" from First Amendment protection. As a consequence, the Court finds itself in what now appears to be a seemingly unending series of *ad hoc* decisions[9] in its attempts to apply various

between residents or products of the state and those of other states." *Schollenberg v. Com. of Pa.*, 171 U.S. 1 (1898). *See also*, "In the case of *Gibbons v. Ogden*, (9 *Wheat. Rep.* 194.) the Court, in speaking of the grant of the power of Congress to regulate commerce, say[s], 'It is not intended to comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to, or affect other States; such a power would be inconvenient, and is certainly unnecessary. The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description." *Brown v. Maryland*, 25 U.S. 419, 452 (1827) (Thompson, J., dissenting).

[7] *Wickard v. Filburn*, 317 U.S. 111 (1942).

[8] *Id.*

[9] Terry Eastland, *Freedom of Expression in the Supreme Court* xxvi (2001) ("In deciding First Amendment claims, the Court has not employed a single mode of analysis. Instead it has used a variety of

(Continued on following page)

philosophically-impossible standards derived from a history of decisions separating speech into artificial and arbitrary categories of commercial and non-commercial speech and is now again presented with a case for which application of this impossible standard is apparently controlling in what should have been little more than a state law fraud case (if even that).

II. DISPARATE SCRUTINY OF "COMMERCIAL" AND "NON-COMMERCIAL" SPEECH IS IMPOSSIBLE BECAUSE OF "INTERMINGLING" AND "INSEPARABILITY OF END AND MEANS."

A. The Intermingling Problem

Much as group rights are untenable (because at any time an individual can belong to more than one group),[10] so too are artificial categories of commercial and

legal concepts and tests, revising or discarding them as new cases arise.")

[10] Ludwig Von Mises, *Human Action* 42-43 (3rd Rev. Ed. 1966) ("All actions are performed by individuals. A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source. It is the meaning which the acting individuals and all those who are touched by their action attribute to an action, that determines its character. The hangman, not the state, executes a criminal. . . . For a social collective has no existence and reality outside of the individual member's actions. The life of a collective is [only] lived in the actions of the individuals constituting its body. Those who want to start the study of human action from the collective unity encounter an insurmountable obstacle in the fact that an individual at the same time can belong and – with the exception of the most primitive tribesman – really belongs to various collective entities.").

non-commercial speech. Seldom is speech wholly one or the other. Nevertheless, this Court relied upon these classifications in deciding *Valentine v. Chrestensen*, 316 U.S. 52 (1942), a decision in which this Court upheld a provision of New York City Sanitary Code prohibiting distribution of commercial and business advertising matter in public streets. Such classification was created even though the facts in *Valentine* highlighted, in a most profound way, the quickly-recognized, inevitable, and impossible problem of separating commercial from non-commercial speech.

In *Valentine*, after purchasing a used submarine from the U.S. Navy, Mr. Chrestensen transported his submarine to New York City for exhibition purposes and began distributing handbills advertising submarine tours for which he was made aware subsequently that he was violating the sanitary code. Because the code exempted political speech and petitions from its prohibition, Chrestensen returned his handbills to the printer and, in an effort to escape the provisions of the ordinance, commissioned the printer to also print on the reverse of his handbills, a "political protest" against the city dock department, which had earlier refused his application for wharfage facilities at the city pier of his preference. While a genuine political protest, the submarine owner admitted to printing his protest on the reverse side of the handbill for the sole purpose of strengthening his case. The New York City police, nevertheless, cited Chrestensen. Moreover, in its decision, this Court saw fit to simply exempt all "commercial speech" from the protection of the First Amendment and upheld the New York "Sanitary" Code.

"For more than 30 years this 'casual, almost offhand' statement in *Chrestensen* . . . operated to exclude commercial speech from the protection afforded by the First Amendment to other types of communication." *Virginia State Board of Pharmacy, et al. v. Virginia Citizen's Consumer Council*, 425 U.S. 748, 776 (1976). This casual offhand categorization which, as Justice Douglas, who was a Member of the Court when *Chrestensen* was decided and who joined that opinion, observed: 'The ruling was casual, almost offhand. And it has not survived reflection." *Cammaran v. U.S.*, 358 U.S. 498, 514 (1959) (concurring opinion). Justice Brennan, joined by Justices Stewart, Marshall, and Powell, also commented: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity." *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n. 6 (1974) (dissenting opinion).

Subsequent to *Valentine*, this Court has attempted to apply an ever-evolving "commercial speech" standard. To cope with Tupperware sellers on New York campuses in Board of Trustees of the *State of New York University v. Fox*, 492 U.S. 469 (1989), the Court ruled that speech involved in product demonstrations in campus dormitory rooms was "commercial speech," for purposes of First Amendment analysis, even though the sellers also touched upon other subjects. In this case, a corporation and students brought action seeking declaratory and injunctive relief against the board of trustees of a state university system based upon the refusal of university officials to permit the corporation to conduct product demonstrations in campus dormitory rooms. Of course, Tupperware sellers, in an attempt to qualify for higher speech protection, argued that much more than the mere selling of

plastic items was taking place, "such as how to be financially responsible and run an efficient home." *Id.* at 469.

Not surprisingly, the impossibility of maintaining such an arbitrary scheme of separating commercial from non-commercial speech again became apparent when, not many years later, the issue of "intermingling" arose again in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). This Court, though expressly overturned by *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), attempted to apply some *Valentine* remnants in *City of Cincinnati,* as it struggled to decide at what point a newspaper that contains mostly advertisements constitutes commercial speech subject to less judicial scrutiny. But analysis of any such continuum requires either an arbitrary line at which a publication is deemed commercial or non-commercial, a multitude of standards for a multitude of commercial and non-commercial percentage or, in the alternative, arbitrary over- and under-inclusive categorizations.

One must ask, however, where the limits of such categorization ends. It must, at a minimum, be acknowledged that the *Denver Post*, the *New York Times*, and CBS also exist if not for the purpose of selling advertising, at least with a profit-making motive. Should we now expose the editorials in the "mainstream" papers and networks to a lesser degree of scrutiny because, like Mr. Chrestensen's submarine flyers, the commentaries come packaged or intermingled with automobile advertisements of one form or another.

B. Ends/Means Problems

Another serious problem exists with the practice of separating speech into commercial and non-commercial categories. That is, the *ends* and *means* for any given communication are only subjectively known and, thus, it is not possible to know whether a *means* that appears to be "commercial" is actually serving a political *end* or a *means* that appears to be political, is actually purely "commercial." Free speech and its protection often serves as a tool or means of achieving political ends that, in turn, only serve to attain purely economic or commercial benefits.

As for political versus "commercial" speech, it was Barber Conable, former U.S. House Member and World Bank President who was quoted as saying, "Hell hath no fury like a vested interest masquerading as a moral principle." Case in point: Lobbyists spend over $100 million per month in order to influence the U.S. Congress.[11] During a campaign finance reform debate, Congressman Ron Paul of Texas explained this degree of lobbyist spending saying, "[g]overnment has tremendous influence over the economy through interest rate controls, contracts, regulations, loans and grants . . . [e]qualizing 'competition' and balancing powers such as between labor and business is a common practice. As long as this system remains in place, the incentive to buy influence will continue."[12] The question, then, is whether buying

[11] Cong. Rec. H4,214-15 (daily ed. June 14, 1999) (Statement of Cong. Paul).

[12] *Id.*

influence in this manner constitutes a "commercial transaction" and is, thus, "commercial" speech.

To some extent, this Court has attempted to wrestle with that preceding question within the ambit of antitrust law. Setting aside, for the purpose of this *amicus* brief, the altogether failure and ineptness of anti-trust laws in a genuine market economy,[13] the *Noerr-Pennington* doctrine provides more insight as to the schizophrenic nature of the law when the artificial categories of commercial and non-commercial speech are applied in their running afoul of antitrust law.

In *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), this Court immunized joint efforts by 24 railroads and an association of railroad presidents to obtain legislation and executive action unfavorable to competing trucking firms. This Court emphasized that condemning the railroad's lobbying campaign "would impute to the Sherman Act a purpose which would have no basis whatever in the legislative history of the Act." Of course, realistically any finding of Sherman Act liability would have raised important constitutional questions considering the right to petition under the First Amendment. Yet, the so-called fundamental freedom of expression by the railroads was engaged in for the sole purpose of eliminating competition from trucks and for purely "commercial" benefit (which, ironically, once achieved, would have been relegated to some lower level of

[13] *See generally*, Domenick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* (1982).

scrutiny in any subsequent commercial-transfer communication). Of course, the *Noerr-Pennington* "sham" exception attempts to treat symptoms of this jurisprudential schizophrenia but even this Court said the boundary between legitimate petitioning and sham behavior might prove to be "a difficult line to discern and draw." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). Further symptoms of this schizophrenia can easily be found in area of campaign finance reform, also.[14]

And, as Justice Stevens wrote in his concurring opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 579-80 (1980), "Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of the speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward."

And so too can commercial means achieve political ends. Suppose someone like Mr. Ted Turner, as he has done, forms a "commercial" cable television network and generates huge profits, $1 billion of which he gives to the

[14] Leaving alone for the purpose of this brief the fact that no enumerated power exists in the federal Constitution to regulate campaigns (and very little authority exists to regulate elections), campaign reform cases can also be an expected outcome of schizophrenic free speech precedent. The artificial bifurcation of speech into commercial and political categories will further muddle the issue as to whether money spent on campaign issue ads is political or commercial speech while proprietary newspaper corporations corner the market on campaign-related speech free of campaign finance restrictions.

United Nations for the purpose of helping women, children, and victims of war in poor countries. Now, too, we have the pursuit of "commercial" speech (presumably) for what are arguably political ends. Another case in point, how might this Court classify the speech of the advertiser selling printing presses to political campaigns?

Given that any chain is only as strong as its weakest link, it makes little sense to classify and grant different levels of judicial protection to *means* "links" and *ends* "links" in the same "chain," when each link is dependent upon the protection and strength of the other. A "chain" constructed for the purpose of achieving political ends necessarily depends upon the strength of at least some "commercial" links.

III. EVEN IF THE COURT COULD APPLY THESE ARTIFICIAL STANDARDS, ECONOMIC DISCOURSE IS PROTECTED.

Nike responded to the media campaign against it by addressing questions of ethics and economic policy relating to whether domestic companies should be responsible for working conditions in factories located in other countries and the effects of economic globalization generally. This Court's cases "have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters – to take a non-exhaustive list of labels – is not entitled to full First Amendment protection." *Abood v. Detroit Board of Education*, 431 U.S. 209, at 231-232 n. 28 (1977). Certainly, this Court cannot now conclude that Nike's economic policy speech is "commercial" or, more

importantly, deceptive and misleading given that "[e]conomics is the only field in which two people can share a Nobel Prize for saying opposing things."[15]

Nike, like every other company, including the corporate producers of the television series "20/20" and "48 Hours," operate to produce products for their customers and profits for their owners, in this case their public shareholders. In so doing, they seek to minimize costs and maximize revenue, as they turn out products demanded in the marketplace. Nike has therefore elected to employ lower cost contract workers in emerging markets, such as Asia and Latin America.

In moving much of its production to lower-cost regions, the company has joined many other businesses, including electronics, semiconductor, and computer manufacturers, as well as software producers and others. These firms employ literally millions of workers who are each individually convinced that they work in jobs offering better compensation packages than any available alternatives.

Given that economists share Nobel prizes for opposing theories, it is not surprising to learn that one can, at the same time, find a long line of "economic virtuosos who think that when an employer and an employee agree to exchange work for wages, the latter is somehow 'exploited' by the former."[16] According to *these* "virtuosos":

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[15] Attributed to Roberto Alazar (specifically, Myrdahl and Hayek shared one).

[16] William Stepp, *Nike is Right*, March 15, 2001, *available at* http://www. mises.org/fullstory.asp?control=628.

> [a] worker accepting a job with a Nike contractor continues to demonstrate how 'exploited' he is by showing up for work every day, and by accepting a paycheck based on mutually-agreed-upon terms. Anyone whose labor is worth less than the government-prescribed minimum is to be consigned to unemployment through no fault of his own; and any business wanting to hire such people must find costlier alternatives. According to this school, a "sweatshop" is a factory where the owners and their employees have the effrontery to agree to employment terms other than those approved by the "sweatshop's" critics.[17]

IV. PUBLIC POLICY DICTATES A RULING IN NIKE'S FAVOR.

A. Disparate Levels of Scrutiny Constitute an Equal Protection Violation.

To the extent two similarly-situated, profit-making ventures are subject to differing levels of government protection, constitutional equal protection may be violated. Differing degrees of First Amendment protection for that which television networks broadcast on their network "news" programming to sell advertising and that which Nike releases to maintain its reputation and, as argued by Kasky, sell sporting apparel, may very well constitute an equal protection violation.

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[17] *Id.*

B. Nike Should Not Be Penalized Domestically For Improving the Social and Economic Welfare of Citizens Residing in Foreign Countries.

Economic principles and history teach that economies do not move from the simple agrarian stage to an advanced industrialized stage overnight or without intermediate stages. Similarly, labor standards do not directly advance from 80 hour weeks spent behind the horse and plow for subsistence wages to thirty hour weeks in air conditioned offices in exchange for salaries capable of purchasing the latest plasma screen television technology. One significant limiting factor in the transition from one stage to the other in what economists define as "developing countries" is the lack of capital accumulation. Companies like Nike, by bringing capital into these countries, speed the progression from one level of production to another but cannot possibly transcend every intermediate stage of production instantaneously.

Moreover, in the real world, when two parties enter into exchanges, they do so because they expect to benefit from the exchange. "The contract workers Nike employs are free to terminate their employment whenever they wish, if they prefer either another job, self-employment, or leisure. To the extent they do not, one can only assume the alternatives, in whatever the level of advancement in that developing country, are necessarily worse."[18]

[18] *Id.*

C. Absent Protecting Speech, Corporations May Be Placed In An Impossible Position

As a consequence of this Court not allowing Nike and others to respond freely to critics, a corporation may find itself a short step away from the most undesirable position of having to choose between lawsuits such as this one or ignoring critics of its managerial and foreign trade practices and suffering instead a shareholder suit alleging negligence for the drop in stock values resulting from its failure to defend itself in the court of public opinion.

V. CONCLUSION

Until this Court completely and emphatically overturns that which it begun to overturn upon the immediate reflection of *Valentine*, only more confusion, more impossible-to-apply standards, and more vague laws will result. This Court's artificial characterization of commercial speech as outside the full protection of the First Amendment, much as the corollary artificial distinction between economic and so-called fundamental liberties, (*i.e.*, freedom of the press is meaningless without property rights in ink), will necessarily result in an erosion of so-called political freedoms, as well.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 28 2003
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(15)

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ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* ON BEHALF OF SRiMEDIA AND CORERATINGS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

SRiMedia PLC ("SRiMedia") is a London based media concern which publishes news and research reports on topics of corporate governance, corporate social responsibility, and socially responsible investment to a global audience. The company and its French and Swiss affiliates comprise the largest publisher of corporate social responsibility news in Europe. The news and reports published by SRiMedia are read widely by European lawmakers, senior corporate executives and compliance officers of some 1200 multinational enterprises, in addition to investment analysts of the top 275 financial institutions in Europe, representing approximately £1.6 Trillion (U.S. $2.52 Trillion) of assets under management. The company also provides news and reports to institutions based in California.

CoreRatings is a London-based ratings agency owned by Fimalac, a publicly-traded French company that is also the majority owner of Fitch Ratings, one of only four rating organizations recognized by the United States Securities and Exchange Commission for the rating of the quality of corporate instruments. Based on both public and confidential information, CoreRatings rates the effectiveness of companies' corporate governance processes and their management of corporate social responsibility risks, including detailed analysis of companies' responses to environmental, social, labor and ethical issues. CoreRatings reports are used widely by the leading European asset management groups in making investment decisions. CoreRatings' clients control in excess of $2 Trillion in investment assets and include among others Barclays Global

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1. Letters from both parties consenting to the filing of all briefs have been filed with the Clerk of this Court. Counsel for the *amici* were the sole authors of this brief. No person or entity other than *amici* made a financial contribution to this brief.

Investors (the world's largest institutional asset manager), ABN Amro (the largest bank in the Netherlands), Allianz (Europe's largest insurance company) and the Swedish and Norwegian state pension systems.

As set forth below, SRiMedia and CoreRatings each has an interest in the outcome of this Court's deliberations regarding the California Supreme Court decision in *Kasky v. Nike* because the decision would deter the corporate transparency which SRiMedia and CoreRatings rely upon, and are intended to serve, by potentially subjecting European companies to suit in California Superior Court for complying with European corporate responsibility reporting law and policy.

SUMMARY OF ARGUMENT

The California Supreme Court decision in *Kasky v. Nike*, 27 Cal. 4th 939 (2002), operates in direct derogation of existing and developing law and policy in the European Union because it discourages the corporate transparency regarding social, ethical and environmental issues that the European Union has made a centerpiece of its support for socially responsible investing and corporate operational activities. More specifically, under the *Kasky* decision a European business entity could potentially be sued in California Superior Court based on allegations that statements it makes in annual reports or other similar publications or to rating agencies were incomplete or misleading, without any requirement of pleading or proving knowing falsity or malice. Thus, the potential imposition of liability against a foreign corporation inherent in the *Kasky* decision violates principles of comity because it raises the potential that a European business entity could be punished for complying with its own laws.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT DECISION IN *KASKY V. NIKE* IS IN DEROGATION OF THE EUROPEAN GOVERNMENTAL MOVEMENT FOR CORPORATE SOCIAL RESPONSIBILITY

A. EUROPEAN GOVERNMENTS AND THE EUROPEAN COMMUNITY ARE ENCOURAGING OR REQUIRING BUSINESS TO REPORT ON SOCIAL, ENVIRONMENTAL AND ETHICAL ISSUES AS PART OF THE MOVEMENT FOR CORPORATE SOCIAL RESPONSIBILITY

SRI Media and CoreRatings urge this Court to overturn the California Supreme Court decision in *Kasky v. Nike, Inc.* (27 Cal. 4th 939 (2002)) because the decision potentially *penalizes* European business enterprises for complying with the growing body of European law and policy for advancing corporate social responsibility and sustainable business operation.

The European Union and companies based in Europe are currently engaged in a vigorous discussion of these issues. They are, in fact, in the process of amending laws and developing policies which already require companies to report to their investors and/or the public regarding the companies' policies about issues such as foreign worker salaries and working conditions, child labor, forced labor and other human rights issues, and environmental problems and sustainability. ("Promoting a European framework for Corporate Social Responsibility, Green Paper of the Commission of the European Communities," COM(2001) 366 final, Brussels 18 July 2001 [hereinafter, "*Promoting a European Framework*"]; *see also* "Concerning corporate social responsibility: a Business contribution to sustainable

development," a Communication from the Commission of the European Communities," COM(2002) 347 final, Brussels 2 July 2002 [hereinafter, "*Communication from the Commission*"].)

The California Supreme Court decision in *Kasky v. Nike* is in direct derogation of this growing body of European law and policy because, as discussed below (*infra*, pp. 11-14), European companies could be subjected to suit in California Superior Court on a theory of strict liability under Cal. Bus. & Prof. Code, sections 17200, *et seq*. and 17500, *et seq*. simply because they comply with such reporting requirements.

Reporting and transparency in the context of socially responsible investing are issues that have been receiving increasing amounts of attention from European governments, business entities and investors. For instance, in July 2000, the United Kingdom amended its Pensions Act of 1995 to address the social and ethical impact of investment choices made by pension fund managers. Mores specifically, this "soft law"[2] enactment required reporting on "the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments." (Pensions Act of 1995, section 35.)

In May 2001, the European Commission adopted recommendations for corporate disclosure on environmental issues in companies' annual reports. ("On the recognition, measurement and disclosure of environmental issues in the

2. The United Kingdom distinguishes between binding statutory law and administrative "soft laws such as codes, departmental circulars, directives , and statements of practice." (*R v. H.M. Advocate and another*, 2002 UKPC D3 (Transcript).)

annual accounts and annual reports of companies," Recommendation of the Commission of European Communities, C(2001) 1495, Brussels 30 May 2001.) At the same time, Denmark's Ministry of Social Affairs developed and published a "social index" by which companies could *self*-evaluate their compliance with social responsibilities in a manner more readily understandable by the ordinary investor. Another member-nation, France, began to require companies to account for "social and environmental consequences" of their activities in annual reports (*Promoting a European Framework*, *supra*, at p. 18) and to require mutual funds into which French workers invest through their employers to report on their policies regarding socially responsible investing. (*Id*. at p. 22.)

In July 2001, the European Commission published a "Green Paper" (policy draft) intended to identify goals and elicit comment from member states, business entities, investors and citizens. (*Promoting a European Framework*, *supra*.) This "Green Paper" noted that the movement to corporate social responsibility was being driven by concerns about globalization, sustainable development and the increasing role of social criteria in both individual and institutional investment. (*Id*. at p. 5.)

The European Commission published the resulting *Communication from the Commission* (*supra*, COM(2002) 347) one year later. It noted that it had received more than 250 responses to the "Green Paper" from employer groups and business organizations, labor organizations, governmental bodies, and individual member states. The Commission noted that while all participants agreed to the usefulness of the public comment process, there were (not surprisingly) significant differences in the positions

expressed by various groups. Significantly, however, many of the various groups considered transparency, by reporting and/or accountability, as crucial to the advancement of socially responsible investing:

> Investors stressed the need to improve disclosure and transparency of companies' practices, rating agencies' methodology and investment management of SRI (socially responsible investment) funds and pension funds;
>
> Consumers' organizations underlined the importance of trustworthy and complete information about the ethical, social and environmental conditions in which goods and services are produced and traded to guide them in their purchase choices;
>
> . . .
>
> The European Parliament proposed to mainstream [corporate social responsibility] [and] called for triple bottom line reporting by companies on their social and environmental performance, including the human rights dimension.

(*Id.* at pp. 4-5.)

Thus, "transparency" regarding corporate conduct became one of the linchpins of the Commission's analysis:

> Transparency is a key element of the CSR debate as it helps businesses to improve their practices and behaviour; transparency also enables business and third parties to measure the results achieved

> . . . Greater transparency also prevents companies from being used for organized crime, and terrorist groups to launder or generate money for their benefit.

(*Id.* at p. 13, and footnote 4.)

The foregoing examples demonstrate that Europeans are committed to making corporate responsibility a central aspect of their institutional and individual investment climate. The Commission of European Communities has made clear that corporate transparency concerning ethical, social and environmental issues is a corollary of this commitment to corporate responsibility. As discussed below (*infra*, pp.11-14), the California Supreme Court decision in *Kasky v. Nike* is in direct derogation of this existing and developing public commitment because it exposes the corporations who comply by reporting, and the entities that publish their statements to investors and the public, to suit in California Superior Court; further it exposes to suit those entities that rate corporate activities in the CSR arena based on information derived from public and confidential company information. It does so because the decision announces a broad expansion of the definition of "commercial speech" designed drastically to lessen First Amendment protection.

B. The Problematic Aspect Of The *Kasky* Decision Is Rooted In Its Impossible Expansion of The Definition Of "Commercial Speech"

The California Supreme Court's decision improperly exposes corporate statements regarding their operations to liability by lumping them in with advertising concerning corporate products. (*Kasky v. Nike*, *supra*, 27 Cal. 4th 939, 961.)

As the Court is aware, the *Kasky* decision arose from an attempt by Nike, Inc. to respond to allegations that their overseas workers were subjected to improper, dangerous and/or illegal work conditions. (*Id.* at 947.) Nike hired former United States Ambassador to the United Nations, Andrew Young, to investigate; thereafter, Nike publicized his conclusions that there was no evidence of unsafe or illegal working conditions. (*Id.* at 947-948.) The Plaintiff, Kasky, brought suit against Nike in San Francisco County Superior Court, alleging that Nike had violated California's Unfair Competition Act (Cal. Bus. & Prof. Code, section 17200, *et seq.*) by *negligently* or *carelessly* having made false or misleading statements regarding its foreign work conditions. (*Id.* at 948.)[3]

The Superior Court sustained Nike's demurrer to Kasky's complaint without leave to amend, and the California Court of Appeal affirmed, on the ground that the responses to public accusations were speech subject to the "absolute" protection of the First Amendment to the United States Constitution and Article I, section 2(a) of the California Constitution. (*Id.*)

The aspect of the *Kasky* decision reversing the Court of Appeal and permitting suit against Nike that is especially problematic is the California Supreme Court's extension of liability for alleged false advertising beyond statements regarding products or services being offered, to include "representations of fact about the **business operations**, products or services of the speaker . . . made for the purpose of promoting sales of, or other commercial transactions in,

3. Because California law allows any person to act as a private attorney general in such suits, Mr. Kasky does not have to have any personal knowledge of these allegations, nor to have suffered any injury as a result of any activity undertaken by Nike.

the speaker's products or services." (*Id.* at 961, emphasis added.) The *Kasky* decision then broadens the definition of products and services to the point where the lesser protection afforded commercial speech would cover any conceivable communication by any commercial enterprise:

> [W]e understand 'product references' to include [] statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service or endorse them. Similarly, references to services would include not only statements about the education, experience, and qualifications of the persons providing or endorsing the services.

(*Id.* at 961.)

This brief is concerned with the effect of the *Kasky* decision on European companies complying with corporate responsibility laws and policies, not specifically with the error inherent in the *Kasky* re-definition of commercial speech. However, one example may suffice to demonstrate the problematic effect of the decision on speech, hitherto unquestionably protected absolutely by the First Amendment, which potentially would subject parties to suit in California Superior Court.

Consider statements to the press in the context of labor disputes, whether by an employer or union, which would now fall within the expanded definition of commercial speech because the statements would concern the manner in which

the employer or union conducted their "business operations." Based on *Kasky*'s expanded definition, a union could allege that the employer's claims about fairness of work conditions were made with an eye to protecting its place in the market, and an employer could allege that the union's claims about unfairness were made to enhance the union's standing with potential members. Each party would then be susceptible to allegations that their "negligence" or "carelessness" was responsible for incomplete or misleading statements. Thus, any labor dispute (already a contentious situation), would have the added potential of suit in California Superior Court for disgorgement of profits pursuant to California's Unfair Competition Law.

Whether or not this scenario is permitted to operate within California, under California law, is not the issue presented by this brief. However, the possibility that European business entities could be subjected to suit in California Superior Court for alleged unfair advertising, based on actions taken in Europe in attempted compliance with European law and policy, compels reversal or reduction of the *Kasky* expansion of the definition of "commercial speech."

C. The Potential That European Businesses Could Be Hauled Into California Superior Court Based On Their *Compliance* With The European Policy Of Transparency Regarding Corporate Responsibility Violates Basic Principles Of Comity

This Court should reverse or reduce the *Kasky* expansion of the definition of "commercial speech" because European business entities should not be subjected to suit in California Superior Court based on their attempted compliance with European law and policy encouraging transparency in the context of corporate responsibility. As set forth above (*supra*, pp. 4-7), the movement for socially responsible investment is being incorporated into European Union law, and transparency regarding social, ethical and environmental issues is considered a centerpiece of this developing policy. Any law that discourages or deters corporate transparency would be in direct derogation to a policy announced and pursued by the European Union and its member nations, and therefore violates notions of international comity. For a single *state* in the United States to impose such law on European business entities is simply impermissible.

This Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." (*Hilton v. Guyot*, 159 U.S. 113, 164 [16 S. Ct. 139, 40 L. Ed. 95] (1895).) Most simply put, comity should be observed when U.S. law *pro*scribes what foreign law *pre*scribes.

This is precisely the situation in which European business entities will find themselves if *Kasky* is left intact. European law will increasingly *pre*scribe the inclusion of statements

regarding their corporate policies on social, ethical and environmental issues in annual reports and other publications aimed at investors and the public. The nature and content of this inclusion will be defined by European law. By complying with this law, however, European entities will potentially expose themselves to suit in California Superior Court based on allegations that they made *pro*scribed statements in their "negligence and carelessness" that were incomplete, or misleading, even if they fully conform to the requirements of European law.

In the context of Federal antitrust law, there is a conflict in Federal decisional authority regarding what will suffice to establish the sort of conflict between U.S. and foreign law triggering the operation of comity. Some decisions in the context of Federal antitrust law have set the bar extremely high: "What is required to establish a true conflict is an allegation that compliance with the regulatory laws of both countries would be impossible." (*Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998), quoting *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1050 (2d Cir. 1996).) Other decisions find it sufficient when enforcement of a U.S. regulation would make compliance with a foreign statute "difficult to imagine." *See, e.g., Trugman-Nash, Inc. v. New Zealand Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997.) However, *no* Federal decision is found that permits a single State in the United States to impose its will *via* extension of its statutory scheme to subject foreign entities to potential liability for complying with their own laws.

The potential exposure is not illusory: California's "long-arm" statute permits its Superior Courts to "exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." (Cal. Code

Civ. Proc. section 410.10.) The only limitation that California places on the exercise of jurisdiction on a non-resident is the due process requirement that it not violate "traditional notions of fair play and substantial justice." (*Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 (1996).) Even where a non-resident's contact with California is nearly non-existent, California courts will exercise jurisdiction based on a weighing of the connection of the non-resident's *conduct* to California. (*Integral Development Corp. v. Weissenbach*, 99 Cal. App. 4th 576, 583-584 (2002), citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 [104 S. Ct. 1868, 80 L. Ed. 2d 404] (1984).)

This broad reading of jurisdiction potentially applies to European companies reporting their compliance with social, ethical or environmental goals in Europe, regardless of whether they have a single facility, or sell a single product, in California. Consider the hypothetical case of a European business attempting to comply with the emerging law and policy on transparency and corporate responsibility. If a California individual or institution considered investing in the company, it is probable that the prospective investor would consider annual reports and/or commercial analyses based on those reports, or ratings undertaken by one of the few SEC recognized rating agencies. The *Kasky* expansion of the definition of commercial speech could be applied to this information, arguably "representations of fact about the business operations . . . made for the purpose of promoting . . . commercial transactions in [] the speaker's products or services." (*Kasky, supra*, 27 Cal. 4th at 961.)

The potential for harm extends beyond European business entities to organizations such as *amici* herein, whose operations are dependent on information from business

entities regarding social, ethical and environmental aspects of the business entities' operations. Amicus are largely, if not entirely, dependent on the business entities on whom they are reporting for the information the collect and analyze. Any significant disincentive to report such information has an immediate negative impact on SRiMedia and CoreRatings.

It must also be noted that it is no defense to this problem to claim that foreign corporations are only liable for false or misleading statements because the *Kasky* decision extends susceptibility to suit under California's unfair competition and false advertising scheme. (*Id.* at 969-970.) This exposure, which includes potential liability for disgorgement of profits, does not require knowing falsity or malice: liability may be imposed based only on "negligence or carelessness," just as the California Supreme Court permitted against Nike. (*Id.* at 948.) Furthermore, suit in California Superior Court brings with it California's liberal discovery policy. (*Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 375-76 (1961); *see* likely European reaction, immediately below.)

Not to oversimplify the issue, but no one wants to be sued anywhere, much less in California. The potential that private attorneys general, that is any resident of California, could haul foreign business entities into California Superior Court and require them to defend suits whose potential exposure includes disgorgement of profits would, in and of itself, act as a disincentive to European companies to comply with the emerging law and policy of corporate transparency. This is in direct derogation of the existing and developing law and policy of the European Union: it potentially penalizes conduct that the European Union prescribes. Principles of international comity call for the reversal or substantial reduction of the *Kasky* decision's virtually unlimited expansion of commercial speech.

D. Negative Results Other Than Discouraging Corporate Transparency Are Likely To Accrue If *Kasky* Is Not Reversed

There are negative results beyond the affect on corporate transparency that will likely accrue if the *Kasky* expansion of the definition of commercial speech is left intact. For example, the simplest means by which a foreign business entity could try to avoid potential suit in California Superior Court based on statements in investment reports is to proscribe communications in or to the United States, investment by Americans, or the purchase or sale of its products or services to Americans. Commentators have long recognized the deleterious effect on American investment opportunities attendant on attempting to impose American regulation on foreign commercial conduct:

> [E]xtraterritorial jurisdiction reduces the range of investments available to American investors. Rather than being able to choose from the full array of securities issued around the world, American investors are limited to those that comply with American disclosure requirements. In other words, U.S. law travels with the investor. As a result, the investor will be less able to diversify her portfolio internationally.

(Choi and Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. Intl. L. & Bus. 207, 226 (Fall 1996).)

Furthermore, the extension of potential liability by *Kasky* is likely to elicit retaliatory legislation by the European Union or its member nations. For example, the discovery procedures

embraced by American courts are not viewed with universal admiration in Europe. Thus, in response to extraterritorial application of American antitrust laws, European nations have in the past enacted statutes whose sole purpose was to impede discovery outside the United States. (Griffin, *Jurisdiction and Enforcement: Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 Geo. Mason L. Rev. 505, 505-06, and see footnotes 3-7.) Indeed, one European Union member nation, France, went so far as to *criminalize* requests for information "with a view to foreign judicial or administrative proceedings or in connection therewith." (*Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 526 n.6 [107 S. Ct. 2542, 96 L. Ed. 2d 461] (1987), quoting French Penal Code, Law No. 80-538.) "These anti-discovery statutes were followed by laws rendering certain types of U.S. antitrust judgments unenforceable in foreign courts [and] legislation creating a statutory cause of action to recover damages paid in satisfaction of U.S. antitrust judgments ('clawback' legislation) . . ." (Griffin, *Jurisdiction and Enforcement*, *supra*.)

There is one more probable effect of leaving the *Kasky* decision unchanged, one that is unavoidably speculative but still bears stating. As set forth above, the European Union has made a public policy of encouraging socially responsible investing, and made corporate transparency on social issues a centerpiece of that policy. The disincentive to this policy created by *Kasky* will create the impression, justified or not, that the United States is more concerned with permitting private citizens (from one state, California) to litigate allegations concerning false advertising than it is with permitting the European Union to move ahead with its goals concerning corporate responsibility. At a minimum, the

United States may be perceived as being more interested in insuring that the small number of false statements be penalized than enabling an emerging culture of corporate candor. It would surely be unfortunate if this were the ultimate result of the *Kasky* decision.[4]

E. This Court Should Restore Free Speech Protection To Communications Regarding Social Responsibility

Amici herein respectfully submit that Petitioner Nike's request that the Court reverse the *Kasky* decision should be granted. At a minimum, the California Supreme Court's unlimited expansion of the definition of commercial speech should be addressed. The expansion, along with its attendant reduced First Amendment protection, works most if not all of the potential mischief in the *Kasky* decision. (*Kasky*, *supra*, 27 Cal. 4th 939, 960-62.) The overbroad definition exposes all business entities, including those in other countries, to strict liability for purported incomplete or misleading information, and based not on the intent to deceive, but on mere "negligence and carelessness."

At a minimum, therefore, this Court should rule that the absolute protection of the Constitution's First Amendment applies to speech by a commercial entity concerning or related issues of corporate responsibility or socially responsible investment. Subject only to the constraints of this Court's decision in *New York Times Co. v. Sullivan* (376 U.S. 254 [84 S. Ct. 710, 11 L. Ed. 2d 686] (1964)) and its progeny (knowing, malicious falsity), speech about social issues connected to business should be free of incumbrance.

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4. This would also be unfortunate in light of the recent major U.S. business scandals based at least in part on a lack of transparency.

CONCLUSION

For the reasons set forth above, *Amici* SRiMedia and CoreRatings respectfully submit that the decision of the California Supreme Court in *Kasky v. Nike* should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

(16)

No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,

v.

MARC KASKY,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

28 pp

QUESTION PRESENTED

Amici curiae addresses the following issue only:

Even assuming the California Supreme Court properly characterized the statements at issue in this case as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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Cal. Bus. & Prof. Code § 17500 4

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Post, *Constitutional Status of Commercial Speech*, 48 UCLA L.REV. 1 (2000) 11-12

Warren & Brandeis, *The Right to Privacy*, 4 HARV. L.REV. 193 (1890) 15

IN THE
SUPREME COURT OF THE UNITED STATES

No. 02-575

NIKE, INC., *et al.*,
Petitioners,
v.
MARC KASKY,
Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states, including many in California.[1] WLF regularly appears before federal and state courts to promote economic

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

liberty, free enterprise, and a limited and accountable government.

In particular, WLF has devoted substantial resources over the years to promoting commercial speech rights, appearing before this Court in cases raising commercial speech issues. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on commercial speech. *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dismissed,* 202 F.3d 331 (D.C. Cir. 2000).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici fully support Petitioners' contention that the speech at issue in this case is properly categorized as "noncommercial." *Amici* write separately to emphasize their particular concern over the second Question Presented and the California Supreme Court's apparent willingness to tolerate legal regimes that are likely to have a significant chilling effect on speech relating to issues of considerable public interest. *Amici* believe that the public interest in the dissemination of such speech will be undermined if the decision below is permitted to stand; that public interest exists

regardless whether the speech at issue is labeled "commercial" or "noncommercial."

Amici are filing this brief because of their interest in promoting the welfare of the business community and the public at large; they has no interest, financial or other, in the outcome of this lawsuit. Blanket consents to the filing of *amicus curiae* briefs have been lodged with the Court by the parties.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Brief for Petitioners.

In brief, Petitioner Nike, Inc. is the world's leading athletic apparel and equipment manufacturer. It products are manufactured by subcontractors at more than 700 facilities around the world. During the past decade, numerous critics of Nike have alleged that workers at many of these overseas facilities have been subject to substandard working conditions. These allegations have been widely reported in newspapers and on television programs and have become an issue of significant public interest. Petition Appendix ("Pet. App.") 3a.

Nike has responded by denying the charges. These denials were disseminated in a variety of ways, including through press releases, letters to newspapers, and letters to university presidents and athletic directors. *Id.* 4a. Nike also took out full-page newspaper advertisements to publicize a report that concluded that there was no evidence of illegal or

unsafe working conditions at Nike facilities in China, Vietnam, and Indonesia.

Some of the Nike denials reached consumers in California, including Respondent Marc Kasky. Kasky alleges that the denials were false, and that in disseminating them, Nike violated California's unfair competition law (UCL), Cal. Bus. & Prof. Code § 17200, and its false advertising law, Cal. Bus. & Prof. Code § 17500. He alleges that Nike made these false statements negligently and carelessly, Pet. App. 4a, and to induce consumers to purchase its products. He does not claim to have been injured by Nike's statements, but he seeks injunctive relief -- including disgorgement of money earned due to the false statements -- and attorney fees.

The trial court sustained Nike's demurrer without leave to amend, holding that the complaint was barred by the First Amendment. The court held that Nike's denials constituted noncommercial speech and as such was protected under the First Amendment from the types of sanctions Kasky sought to impose. *Id.* 4a-5a, 80a. The California Court of Appeal affirmed. *Id.* 66a-79a.

By a 4-3 vote, the California Supreme Court reversed and remanded. *Id.* 1a-30a. Accepting as true the allegations of the complaint, the court determined that the Nike denials should be deemed commercial speech:

> Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception.

Id. at 23a. The court held that the Nike denials were not exempt from categorization as commercial speech simply because "they related to a matter of significant public interest or controversy." *Id.* Because it deemed the denials commercial speech and because Kasky alleged that the denials were false, the court held that the speech was not entitled to *any* First Amendment protection:

> [C]ommercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech restrictions.

Id. 27a. Reversing the decision to sustain Nike's demurrer, the court remanded the case to the Court of Appeal for further proceedings. *Id.* 30a.

SUMMARY OF ARGUMENT

By permitting corporations to be haled into court and forced to defend their speech on matters of public concern based on an uninjured plaintiffs' mere belief that the speech is false, California has caused the entire business community to stand up and take notice. Business are likely to be far less willing to engage in such speech in light of those consequences. Even though a business may believe that its speech is noncommercial, it may well be deterred from speaking by the fear that a reviewing court might reach the opposite conclusion.

In general, this Court has attempted to divide all speech by commercial entities into one of two categories -- commercial and noncommercial -- and to allow that categorization alone to determine the level of First Amendment protection to be afforded. That approach has been unsatisfying. As the Court has repeatedly conceded, there is no easy method by which commercial and noncommercial speech can be differentiated, yet the consequences of how the speech is classified are huge in terms of how far a State may go in regulating the speech. Because it may never be possible to draw a bright-line distinction between commercial and noncommercial speech, *amici* respectfully suggest that the Court develop alternative First Amendment criteria for testing speech restrictions when the speech at issue falls somewhere near the gray area dividing the two speech categories.

Amici agree with Petitioners that the speech at issue in this case should be deemed noncommercial. But the Court need not resolve that issue to rule in Petitioners' favor. Rather, *amici* respectfully suggest that the Court declare that speech of public interest, regardless whether classified as commercial or noncommercial, should be accorded full First Amendment protection if the speech does not directly relate to the characteristics of a product or service offered for sale. Such a rule would be consistent with the Court's longstanding policy of giving greater First Amendment protection to speech on matters of public interest. At the same time, it would not adversely affect the government's interest in preserving a fair bargaining process because that interest is at its nadir when the speech at issue does not directly relate to the characteristics of a product or service offered for sale.

ARGUMENT

I. DETERMINING WHICH SIDE OF THE COMMERCIAL/NONCOMMERCIAL LINE SPEECH FALLS ONTO CAN BE VERY DIFFICULT AND NEED NOT BE ATTEMPTED WHEN THE SPEECH AT ISSUE IS ENTITLED TO FULL PROTECTION NO MATTER HOW CHARACTERIZED

In determining the degree of protection accorded speech under the First Amendment, the Court has drawn a distinction between "commercial speech" and other forms of protected speech. *See, e.g., Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 455-56 (1978). Noncommercial speech is extended protection of the highest order. In contrast, commercial speech has been extended less, but certainly not insubstantial, protection than expressions that are noncommercial in nature. *See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562-63 (1980).

Under current case law, how the speech at issue is categorized is often outcome-determinative. When the government seeks to regulate speech on the basis of its content, the government will almost always be deemed to have violated the First Amendment if the speech is noncommercial; but it will be granted substantially more leeway if the speech is commercial.

Yet, even though so much is often riding on the categorization decision, the line dividing the two categories has never been clearly drawn. The Court has struggled for more than two decades in its efforts to provide a clear

demarcation. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) ("the precise boundaries of the category of . . . commercial speech" are "subject to doubt, perhaps"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (noting "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category"); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995)(Stevens, J., concurring in the judgment) ("the borders of the commercial speech category are not nearly as clear as the Court has assumed"). Because it may never be possible to draw a bright-line distinction between commercial and noncommercial speech, *amici* respectfully suggest that the Court should develop alternative First Amendment criteria for testing speech restrictions when the speech at issue falls somewhere near the gray area dividing the two speech categories.

Amici agree with Petitioners that the speech at issue in this case should be deemed noncommercial speech. But the Court need not resolve that issue in order to rule in Petitioners' favor. Rather, *amici* respectfully suggest that the Court declare that speech of public interest, regardless whether classified as commercial or noncommercial, should be accorded full First Amendment protection if the speech does not directly relate to the characteristics of a product or service offered for sale. Applying that standard, Nike's speech must be accorded full First Amendment protection, and the decision of the California Supreme Court must be reversed.

A. The Court's Various Tests for What Constitutes Commercial Speech Do Not Provide Clear Guidance in Many Circumstances

The Court has announced several different formulations for identifying commercial speech. Most frequently, the Court has defined "commercial speech" as speech that "propose[s] a commercial transaction." *Bd. of Trustees v. Fox*, 492 U.S. 469, 473 (1989); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

Determining when a commercial entity has been deemed to have proposed a commercial transaction is by no means an easy task, however. For example, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court faced the issue of whether a condom manufacturer's unsolicited mass mailings of informational pamphlets regarding its products should be deemed commercial speech. The Court determined that the mailings did, indeed, constitute "commercial speech" -- "notwithstanding the fact that they contain[ed] discussions of important public issues such as venereal disease and family planning" -- based on the combination of three factors: (1) the pamphlets were conceded to be advertising; (2) they made reference to specific products offered for sale by the manufacturer;[2] and (3) the manufacturer had an economic motivation for mailing the pamphlets. *Id.* at 66-68. Nor may a firm that offers a product for sale transform its advertisements into noncommercial speech by "'link[ing] [its]

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[2] The Court added, however, "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech." *Bolger*, 463 U.S. at 67 n.14.

product to a current public debate.'" *Id.* at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

As *Bolger* illustrates, an *explicit* proposal of an economic transaction is not a prerequisite for speech to be deemed commercial. Indeed, the great majority of what is commonly understood to constitute commercial speech contains no such proposal. For example, many manufacturers pay premium advertising rates simply to display their product logo, on the assumption that the more familiar consumers are with the logo, the more likely they are to purchase the product; such displays quite clearly constitute commercial speech.

The Court has made plain, however, that at least some speech by corporations should be deemed noncommercial, even when widely disseminated. *Bolger*, for example, stated that companies are entitled to "the full panoply of [First Amendment] protections" when they make "comments on public issues" in at least some contexts. *Id.* The Court has rejected assertions that speech should be deemed commercial any time it is issued in the name of a for-profit corporation. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

The California Supreme Court's decision may well conflict with *Bellotti* and *Bolger* to the extent that it found the speech at issue in this case "commercial" based principally on a finding that Nike's speech was profit-motivated. Pet. App. 18a-22a. One can reasonably assume that a corporation will never speak publicly in its own name unless it believes that the speech will inure to the corporation's long-term financial interest -- in that sense it views its corporate name as one of its products. Thus, by suggesting that such a motivation is

sufficient to classify speech as "commercial," the California court in essence is suggesting, contrary to *Bellotti* and *Bolger*, that virtually all speech uttered by a corporation should be deemed commercial. Indeed, the dissenting justices on the California court leveled that very charge. Pet. App. 48a.

Moreover, the Court has made clear that there are at least some instances in which commercial speech is "inextricably intertwined" with noncommercial speech on matters of public interest. *Fox*, 492 U.S. at 474; *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). In those instances, the Court has held, the entirety of the speech is entitled to full First Amendment protection. *Id.*

An advertisement explicitly offering to sell a particular product undoubtedly is commercial speech. *Bellotti* held that a corporation that runs advertisements in its own name urging voters to oppose adoption of a graduated income tax is not engaged in commercial speech. In between those extremes lies significant amounts of speech by businesses that cannot easily be classified as either commercial or noncommercial.

B. Despite the Difficulties in Determining Whether Speech Qualifies as "Commercial," There Are Valid Reasons for Continuing to Draw the Basic Distinction Between Commercial and Noncommercial Speech

The difficulty in drawing a clear line between commercial and noncommercial speech has led some commentators to suggest that the entire distinction be scrapped. *See, e.g.*, Kozinski & Banner, *Who's Afraid of Commercial Speech*, 76 VA. L.REV. 627 (1990); Post, *The*

Constitutional Status of Commercial Speech, 48 UCLA L.REV. 1 (2000). Several members of this Court have expressed dissatisfaction with the *Central Hudson* formulation for distinguishing commercial and noncommercial speech. *See, e.g., Thompson v. Western States Medical Center,* 122 S. Ct. 1497, 1509 (2002) (Thomas, J., concurring); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517-18 (Scalia, J., concurring in part and concurring in the judgment).

Nonetheless, there are valid reasons for continuing to draw the basic distinction between commercial and noncommercial speech and in granting the government somewhat freer rein in its regulation of the former than of the latter. In particular, speech uttered in a commercial context implicates the government's interest in "preservation of a fair bargaining process," an interest that often cannot be vindicated without some regulation of that speech. *44 Liquormart*, 517 at 501 (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ); accord, *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 577 (2001) (Thomas, J., concurring in part and concurring in the judgment).

Often, governments will seek to preserve a "fair bargaining process" by regulating commercial speech to ensure that it is not false or misleading, nor even potentially so. On occasion, governments will be justified in regulating even fully truthful commercial speech in order to preserve a fair bargaining process. For example, the federal government has a strong interest in ensuring that no pharmaceutical is marketed for a particular intended use until the Food and Drug Administration (FDA) has tested the drug and approved it for that use. *Western States,* 122 S. Ct. at 1505. That interest is sufficient to permit the FDA to bar

companies from advertising the drug as safe and effective for a use that has not yet been approved by FDA, no matter how truthful the companies' claims may be. The government also has an interest in regulating truthful speech directed explicitly at children, who may lack the maturity to use wisely all the speech they might otherwise be given. For example, it seems logical to apply commercial speech standards to government regulation of truthful cigarette or alcohol advertising placed in a high school newspaper or in a school building. *Cf. Lorillard Tobacco,* 533 U.S. at 570-71. Such regulation would virtually never be permissible if the court were to scrap distinctions between commercial and noncommercial speech and begin applying normal (*i.e.*, heightened) First Amendment standards to both categories of speech.

Accordingly, it is unavoidable that courts will have to remain in the business of distinguishing between commercial and noncommercial speech. But because those distinctions will often be difficult to make, it makes sense for the Court to adopt alternative methods of resolving First Amendment claims in close cases.

II. SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION IF IT CONCERNS MATTERS OF PUBLIC INTEREST THAT DO NOT DIRECTLY RELATE TO THE CHARACTERISTICS OF A PRODUCT OR SERVICE OFFERED FOR SALE

As the California Supreme Court readily conceded, the speech at issue in this case was a matter of public interest; Nike's overseas labor practices have been widely debated in recent years, and there is widespread interest in Nike's views of the subject. Moreover, the speech said nothing about the

specific qualities and prices of goods offered for sale by Nike, and thus there was little danger that the speech could do anything to interfere with "a fair bargaining process." Under those circumstances, *amici* submit that there is ample precedent to justify a ruling that Nike's speech is entitled to full First Amendment protection.

A. The Court Consistently Has Given Greater First Amendment Protection to Speech on Matters of Public Interest

In a variety of contexts, the Court has consistently given enhanced levels of First Amendment protection to speech on matters of public interest. There is no reason not to expand that special regard for speech on matters of public interest into the commercial speech sphere.

When those seeking to disseminate information have been challenged by those asserting a privacy interest in nondissemination, the Court has consistently resolved such disputes by reference to whether the information involved a matter of public interest. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (publication of juvenile court proceedings; "if a newspaper obtains truthful information about *a matter of public significance*, then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.") (emphasis added); *New York Times Co. v. United States*, 403 U.S. 713 (1971)(*per curiam*) (publication of Pentagon Papers over objections of federal government justified in part by fact that papers included information of great public concern); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967). Most recently, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that the First Amendment prevented individuals whose

illegally intercepted telephone conversations had been broadcast on a radio station from suing the radio station, in large measure because the conversations involved "information of public concern." 532 U.S. at 534. The Court explained:

> In these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: "The right of privacy does not prohibit any publication of matter which is of public or general interest." The Right to Privacy, 4 Harv. L.Rev. 193, 214 (1890). One of the costs associated with participation in public affairs is an attendant loss of privacy.

Id.

Similarly, the First Amendment right of government employees to speak freely (without fear of discipline by their employers) hinges to a large degree on the public importance of the issues addressed. The First Amendment prohibits a government from disciplining one of its employees for engaging in speech if: (1) the speech addresses a matter of public concern; and (2) the employee's speech rights outweigh the government employer's interest "in promoting efficiency of the public services it performs through its employees." *Pickering v. Bd. of Education*, 391 U.S. 563, 566 (1968).

First Amendment protection of speech on matters of public interest extends even to speech that is false. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court held that the First Amendment prohibited imposition of damages

in a libel suit filed in response to false information negligently included in a newspaper advertisement, in large measure because the plaintiff's status as a public figure made the case of public interest. The Court arrived at that conclusion after reviewing numerous cases that all relied on the "profound national commitment to the principle that debate *on public issues* should be uninhibited, robust, and wide open." *Id.* at 270 (emphasis added).

Similarly, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving wholly false speech where the defamatory statements do *not* involve matter of public concern, even in the absence of a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 755-61 (plurality).[3] The Court thus declined to extend its ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that a showing of "actual malice" was required before such damages could be awarded in libel cases in which the false and defamatory statements *did* involve matters of public concern.

Amici do not contend that commercial speech should automatically be entitled to full First Amendment protection simply because it involves a matter of public concern. *See Bolger*, 463 U.S. at 67-68 (pamphlets distributed by manufacturer subject are to regulation under *Central Hudson* test "notwithstanding the fact that they contain discussion of important public issues."). But this Court's case law indicates that commercial speech involving a matter of public

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[3] *Dun & Bradstreet* involved a credit report on a private entity that admittedly included false information.

concern is entitled to a greater degree of First Amendment solicitude than commercial speech involving matters of purely private concern.

B. The Government's Interest in Regulating Speech To Preserve a Fair Bargaining Process Is Diminished When the Speech Does Not Directly Relate to the Characteristics of a Product or Service Offered for Sale

As noted above, recent decisions from this Court have made clear that the principal justification for permitting increased government regulation of commercial speech is to ensure that the government can preserve a fair bargaining process. That interest is considerably diminished if the commercial speech in question does not directly relate to the characteristics of a product or service offered for sale.

A State's interest in sanctioning false commercial speech undoubtedly is at its highest when the speech *does* directly concern the characteristics of the commercial speaker's product or service (*e.g.*, the price, efficacy, quality, value, or safety). It is precisely such speech that consumers are most likely to rely on when making purchase decisions. In contrast, speech of the type engaged in by Nike -- discussion of its general business operations -- may lead consumers to feel more warmly about a company and ultimately more likely to purchase one of the company's product, but it is highly unlikely that a consumer would rely on a company's statements regarding its general business operations as his primary basis for buying a specific product. The unlikelihood of such reliance suggests that a greater level of First Amendment breathing room ought to be afforded to

statements regarding general company policy, such as a company's overseas labor record.

In her dissenting opinion, Justice Brown suggested just such an analysis:

> Such an accommodation [of the relevant constitutional concerns] could permit states to bar *all* false or misleading representations about the characteristics of a product or service -- i.e., the efficacy, quality, value, or safety of the product or service -- without justification even if these characteristics have become a public issue. In such a situation, the governmental interest in protecting consumers from fraud is especially strong because these representations address the fundamental questions asked by every consumer when he or she makes a buying decision: does the product or service work well and reliably, is the product or service harmful and is the product or service worth the cost? Moreover, these representations are the traditional target of false advertising laws. Thus, the strong governmental interest in this context trumps any First Amendment concerns presented by a blanket prohibition on such false or misleading representations.
>
> By contrast, the governmental interest in protecting against consumer fraud is less strong if the representations are unrelated to the characteristics of the product or service. In some situations involving these representations, the First Amendment *may* trump this government interest. A blanket prohibition of false or misleading misrepresentations in such a situation would be unconstitutional because the prohibition may stifle

> the ability of business to comment on public issues. Indeed, this case offers a prime example.

Pet. App. 62a-63a.

Amici do not suggest that the First Amendment fully protects companies for any and all statements they make that do not directly relate to the characteristics of a product or service offered for sale. But *amici* submit that, as suggested by Justice Brown in dissent, such statements *are* fully protected to the extent that they touch upon matters of public concern.

C. Other Rationales Sometimes Put Forward in Support of Commercial Speech Restrictions Are Inapplicable to the Facts of This Case

In addition to its concern for preserving a fair bargaining process, the Court has identified two other rationales for withholding First Amendment protection from commercial speech that is false or misleading. First, commercial speech is thought to be hardier than other forms of speech. *Virginia Bd. of Pharmacy*, 425 U.S. at 772 n.24; *Bd. of Trustees v. Fox*, 492 U.S. at 481. Second, the truth of commercial speech is thought to be more easily verifiable by the disseminator. *Id.* Neither rationale has any application to the facts of this case.

The theory that commercial speech has more "hardiness" than other forms of speech is born of the belief that commercial cannot be chilled -- companies will always find a way to advertise products because they need to advertise in order to generate sales. What that theory overlooks is the type of advertising that companies are likely

to engage in. A company that seeks to increase its sales and profits can select from numerous options for achieving that goal. Corporate image advertising -- for example, an advertisement depicting a famous athlete working out while wearing clothing displaying the Nike insignia -- is one such option. Moreover, such advertising has as one of its greatest attractions the fact that, because it contains no statements of fact, it almost surely will not become the target of litigation. Accordingly, as California increases its constraints on corporations that seek to speak out on issues of significant public interest, such speech will be chilled as businesses turn to promotional techniques with fewer down sides. Overall corporate speech levels are likely to remain hardy if the decision below is affirmed, but speech on topics of public concern -- the very type of speech of which the First Amendment is most solicitous -- is likely to plummet.

The Court's other rationale for providing a lesser degree of First Amendment protection for commercial speech -- that supposedly its truth is more easily verifiable -- is similarly inapplicable in cases of this sort. To the extent that commercial speech involves the terms of a proposed sale or the characteristics of the product being offered for sale, the speaker is in a good position to verify any product claims: the speaker knows the terms of sale that he himself has established, and likely is well acquainted with the quality of his own product. But speech on matters of public concern that do not directly relate to the characteristics of a product or service offered for sale (*e.g.*, speech on an overseas labor policy) are far less easily verified.

In sum, none of the rationales for commercial speech restrictions cited by the Court in previous cases justifies restrictions on speech concerning matters of public interest

that do not directly relate to the characteristics of a product or service offered for sale.

III. BECAUSE THE NIKE SPEECH BEING CHALLENGED IN THIS CASE IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION, THE COMPLAINT MUST BE DISMISSED

Under the First Amendment analysis set forth in the previous section, Nike is entitled to dismissal of the complaint filed by Respondent Kasky. Such dismissal is warranted regardless whether Nike's statements regarding its overseas labor policy are deemed commercial or noncommercial speech. Mr. Kasky does not contend that those statements relate to the quality of any of the products that Nike offers for sale. Nor does he deny that the statements involve a matter of considerable public interest.

Under First Amendment standards applicable to this case, Nike is not left totally unaccountable for its statements. The First Amendment would not protect Nike from claims that it spoke with "actual malice" -- knowledge of falsity or conscious disregard for the truth. But Mr. Kasky has not alleged that degree of culpability; he alleges only that Nike was negligent in its statements. Pet. App. 4a. Such allegations are insufficient to overcome a First Amendment defense.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court reverse the judgment of the California Supreme Court.

Respectfully submitted,

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Dated: February 28, 2003

(17)

Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

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BRIEF OF THE CENTER FOR THE ADVANCEMENT OF CAPITALISM AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

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Miscellaneous:

Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 2

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

[1] CAC files this brief with the consent of all parties. The letters granting blanket consent have been filed concurrently in both cases. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

The effect the decision below on commercial speech is a subject of great interest to CAC and its supporters. A fundamental tenet of CAC's mission is the support of individual rights as an organizing principle of society. The case at bar directly challenges the right of individuals, when acting through a corporation, to engage in unshackled speech on matters related to their economic self-interest. For this reason, CAC maintains a critical interest in the outcome of this case.

SUMMARY OF ARGUMENT

Nike argues that the California Supreme Court improperly applied the commercial speech doctrine. This argument neglects the essential problem of the case—the commercial speech doctrine itself. Since this Court "plucked the commercial speech doctrine out of thin air"[2] more than 60 years ago, the lower courts have struggled to apply a vague, yet seemingly inflexible standard for deciding which speech deserves First Amendment protection and which does not. The outcome of the decision below is typical. A bare majority of the California Supreme Court held, in essence, that the identity and motive of a speaker alone deny full First Amendment speech protection. While this Court could adopt a narrow remedy tailored to address Nike's grievances, a proper approach would be to admit error and abolish the judicial distinction between "commercial" and "noncommercial" speech in its entirety.

JUSTICE THOMAS has already issued this call. Six years ago, the Court delivered a unanimous but fractured judgment in 44 *Liquormart v. Rhode Island*.[3] The Court held that a state ban on liquor advertising ran afoul of the *Central Hudson* test[4] for restricting commercial speech. In

[2] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).
[3] 517 U.S. 484 (1996).
[4] *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

concurring with the Court's judgment, JUSTICE THOMAS argued persuasively that *Central Hudson* itself should be abandoned as the governing rule since, as he put it, "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech."[5] *Amicus* agrees.

The proof can be found, *amicus* believes, in the concept of individual rights as implemented by the Ninth Amendment, which extends the protection of individual rights to specific applications not actually enumerated in the Constitution itself. Rather than chase the ghosts of historical figures, the Court would do well to recognize that the Ninth Amendment provides adequate proof that the Constitution's framers expected this Court to provide absolute protection for individual rights without an extended inquiry into original intent or the common practices of past societies.

In overruling the commercial speech doctrine, the Court should recognize the logical relationship between economic motives, individual rights, and the federal Constitution's purpose in protecting free speech by protecting all non-fraudulent and non-defamatory speech, whether private or commercial. At the same time, the Court ought to shift the burden back to the state to establish a valid regulatory interest at the outset, rather than allow specious claims such as Marc Kasky's to create an unworkable patchwork of contradictory judicial precedents.

ARGUMENT

I. There is no philosophic justification for the commercial speech doctrine.

While Kasky's claims against Nike lack merit, his action is instructive in identifying the fundamental flaw in the commercial speech doctrine's violation of the right to free speech.

[5] 517 U.S. at 522.

In maintaining the modern commercial speech doctrine, the Court has failed to recognize that individuals value their membership in society largely for the selfish economic benefits that come from free trade with others. In a society that recognizes individual rights, all interactions are voluntary, based on mutual exchange to mutual benefit. It is only in a system of free and un-coerced exchange that individuals can properly trade to mutual benefit. Accordingly, one's political interests and one's economic interests are joined, sharing the same selfish motivation and deserving the same protection.

Yet in failing to protect the speech necessary to defend an individual's economic relationships with others, the Court has relegated self-interested speech to an intellectual ghetto. In the case before the Court, the California Supreme Court holds that because Nike, as a corporation, is acting out of its own economic self-interest, its employees and shareholders ultimately have no right to submit their views to the public. This view is false.

The standard-bearer for the commercial speech doctrine, *Central Hudson*, held that "commercial" speech is any expression "related solely to the economic interests of the speaker and its audience."[6] Building on that foundation, *Bolger v. Youngs Drug Product Corp.* decided that "the speaker's economic motivation" is one of three critical factors in determining whether speech is commercial.[7] Read in tandem, the message is clear: speech motivated by economic self-interest is inherently less deserving of constitutional protection than other classes of speech.

There is no proof as to *why* economic motivation should cause speech to be suspect. A number of decisions argue that because commercial speech is more easily verified for accuracy than noncommercial speech, the risks posed by

[6] 447 U.S. at 561.
[7] 463 U.S. 60, 66-67 (1983).

government restraints are not as acute. This makes little sense. The reason for the private-commercial speech dichotomy is a product of modern government's schizophrenic view of its citizens. On the one hand, individuals are presumed to be well-informed when it comes to political decision-making; on the other hand, these same individuals are considered incompetent victims when it comes to economic decision-making. This leads to what the Court acknowledges are paternalistic regulations which attempt to restrict the flow of information to consumers in order to manipulate their economic choices.

The commercial speech doctrine is such a paternalistic policy. As a matter of ethics, the doctrine endorses the beliefs of people like Kasky—that political speech like his is deemed to be in the "public" interest, while Nike's speech is automatically suspect because it is motivated by commercial self-interest.

Yet political and economic speech are equally essential to the success of an individual's life. The Constitution should not be interpreted to uphold the sanctity of an individual's right to speak on issues affecting his interests while simultaneously restraining him from speaking to advance his trade. Yet the commercial speech doctrine does just that. Inter alia, this Court has claimed that recognizing the equality of commercial and political speech will somehow "devitalize" the First Amendment. Consider the following passage from *Ohralik v. Ohio State Bar Association*:

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with

> respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[8]

The claim that there exists a "common sense" distinction between commercial and non-commercial speech stands only if one rejects the importance of free speech in advancing one's legitimate economic interests. This artificial distinction collapses when one recognizes that an individual has a right to his life and the legitimate steps necessary to preserve and advance it; an individual must have the right to integrate all aspects of his life. The real "dilution" of the right to free speech, if not its outright violation, takes place when different speakers are afforded different levels of protection based on their identity and viewpoint. The decision below dilutes Nike's rights simply because it is a corporation acting in its economic self-interest.

If an individual Nike shareholder were to comment on the company's labor practices, it is doubtful that his speech would be labeled "commercial" and thereby unprotected by the First Amendment. How then does this individual right disappear simply because a shareholder has spoken though his authorized agents at Nike headquarters? It doesn't. Corporations allow individuals to distinguish their businesses legally from their personal affairs. This distinction, however, does not erode the Constitutional rights of a corporation's owners. Nike is not an evil, soulless demon, but the legal agent of thousands of shareholders and employees. Nike's speech is ultimately *their* speech.

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[8] 436 U.S. 447, 455-456 (1978).

II. There is no historical justification for the commercial speech doctrine, nor is one required under the Ninth Amendment.

In its unanimous judgment in 44 *Liquormart v. Rhode Island,* the Court held that a state ban on liquor advertising ran afoul of the *Central Hudson* test for restricting commercial speech. While JUSTICE THOMAS argued that *Central Hudson* should be abandoned as the governing rule[9], in a separate concurrence, JUSTICE SCALIA countered that more historical evidence was required before the Court could abandon the commercial speech doctrine. Specifically, we should look to the "long accepted practices of the American people" with respect to free speech. JUSTICE SCALIA chides the parties and *amici* in 44 *Liquormart* for not discussing such historical factors:

> The *amicus* brief on behalf of the American Advertising Federation et al. did examine various expressions of view at the time the First Amendment was adopted; they are consistent with First Amendment protection for commercial speech, but certainly not dispositive. I consider more relevant the state legislative practices prevalent at the time the First Amendment was adopted, since almost all of the States had free-speech constitutional guarantees of their own, whose meaning was not likely to have been different from the federal constitutional provision derived from them. Perhaps more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus

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[9] 517 U.S. at 518 (THOMAS, J., concurring in part and concurring in judgment).

> regarding free speech. Indeed, it is rare that any nationwide practice would develop contrary to a proper understanding of the First Amendment itself—for which reason I think also relevant any national consensus that had formed regarding state regulation of advertising *after* the Fourteenth Amendment, and before this Court's entry into the field.[10]

The yearning for historical context misses the point. It should not be necessary for Nike to prove the existence of its First Amendment rights by identifying specific historical statements in support of "commercial" speech. Indeed, where would one find such "dispositive" evidence? Presumably, not every state legislature—at any given time—holds identical views regarding commercial speech, the Fourteenth Amendment, or any other identifiable topic. It has never been necessary in other First Amendment contexts for a challenged party to demonstrate positively that their expressive acts represent a "long accepted practice." Under such a requirement, this Court would never have recognized First Amendment protections for flag burning, the distribution of adult magazines, or student expression on school grounds.

In short, a lack of historical evidence must not foreclose protection for "commercial" speech. But if evidence were needed, the Ninth Amendment provides it. The amendment provides "The enumeration, in this Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Historically, the Court has been reluctant to read much into this amendment, choosing to uphold non-enumerated rights under the Fifth and Fourteenth Amendments instead. Then, in June of 1965, the Court handed down its radical decision in *Griswold v. Connecticut*[11], wherein the Court upheld the unenumerated

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[10] 517 U.S. at 517 (SCALIA, J., concurring in part and concurring in judgment).

[11] 381 U.S. 479 (1965).

right of a married couple to use contraception, availing itself of the Ninth Amendment in rendering its holding. In a concurring opinion, Justice Goldberg, joined by Justice Brennan and Chief Justice Warren, wrote:

> Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the Sates as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. United Public Workers v. Mitchell, 330 U.S. 75. 94 - 95.[12]

In the case now before the Court, the Ninth Amendment provides the key to understanding the scope and reach of the First Amendment.

The express reason for including the Ninth Amendment was to assuage fears that adoption of the preceding eight amendments would limit individual rights to only those specifically enumerated. Yet in the 210 years since Congress

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[12] 381 U.S. at 487 (Goldberg, J., concurring).

proposed the Bill of Rights, there has been little judicial effort to make effective and proper use of the Ninth Amendment. Presumably, there is a fear that reliance on the Ninth Amendment would lead the judiciary to manufacture non-existent rights.

In the context of a constitution, a clause either explicitly provides for a situation or authorizes a broad inquiry into circumstances that change over time. It would be most peculiar for any section of the Constitution to grant broad authority, only to have a body such as this Court hold precisely the opposite—that the clause can be used only when explicitly authorized by historical evidence.

The best way to understand the Ninth Amendment's role is to examine one of this Court's earliest efforts at constitutional construction, *McCulloch v. Maryland*.[13] Unlike this case, which deals with rights, *McCulloch* discussed congressional powers under Article I, specifically whether Congress possessed adequate authority to charter a corporation. A unanimous Court held that Congress possessed such authority under the Necessary and Proper Clause.[14] In interpreting the clause, the Court said that for Congress to execute its specifically enumerated powers, it must be permitted to employ "convenient, or useful, or essential" methods that the Constitution's Framers may not have envisioned.[15] Today, this concept is axiomatic.

Just as the Necessary and Proper Clause gives life to Congress' enumerated powers, the Ninth Amendment authorizes the Court to identify and protect the specific activities implicit in the moral principle of the right to life. The amendment is designed to animate the principle of individual rights that stands at the heart of American government. In the present case, the relationship is readily

[13] 17 U.S. 316 (1819).
[14] U.S. CONST., Art. I, § 8, cl. 18.
[15] 17 U.S. at 414.

understood. The Framers may not have considered whether the First Amendment extended to "commercial" speech—just as the Framers may not have considered whether Congress could form a corporation—but that does not mean that there is no such right. As discussed above, an individual's commercial and political interests are inseparable. There is no distinct class of "commercial" interests that can be segregated from the remainder of man's existence. Paralleling *McCulloch*, a crucial question before the Court is whether identifying and protecting the value of "commercial" speech is essential to effectively carry out the First Amendment. *Amicus* believes it is.

Analyzed in this light, the issue of historical evidence and traditional practices is moot, because a proper Ninth Amendment analysis looks towards man's rights as they are properly exercised. Whether "commercial" speech was protected at the time the First or Fourteenth Amendment was adopted is of far less concern than whether protection of such speech properly carries out the intended goal of the First Amendment. This question is discussed above. A related question, however, is whether the constitution itself should be expected to provide for all future circumstances related to its interpretation.

The *McCulloch* Court, in looking at the Necessary and Proper Clause, recognized what the Constitution could do, and more importantly, what it could not do: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the [Constitution], and *give it the properties of a legal code.*"[16] The same holds true for the Ninth Amendment. It serves as a direction to identify the scope of individual rights without resorting to explicit Constitutional enumerations, original intent, or historical practice. The

[16] Id. at 415. [emphasis added]

Ninth Amendment is the "necessary and proper" clause for individual rights.

The Ninth Amendment creates a presumption in favor of rationally provable, yet unenumerated rights. In the context of the present case, for instance, Kasky must demonstrate an established governmental interest that convincingly overrules the First and Ninth Amendment presumptions that Nike's speech is protected. Kasky has not done so. The government has no legitimate interest in regulating the kind of advertising at issue here.

The intermediate appellate court in California saw Kasky's efforts for what they were, declaring: "We take judicial notice that this debate calls for action ranging from international labor standards to consumer boycotts. Information about the labor practices of Nike's overseas plants thus constitutes data relevant to a controversy of great public interest in our times."[17] Even if the First Amendment did not protect overtly "commercial" speech, it would still prevent the state from trying to rig the outcome of a public debate. To that end, the California state constitution is more explicit in its enumeration of free speech rights than the federal Constitution: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[18] Coupled with the federal guarantees of the First and Ninth Amendments, Kasky can not rebut the strong presumption in favor of protecting Nike's speech rights.

In his original complaint, Kasky sought relief on grounds that Nike falsely claimed that it "is doing a good job and 'acting morally'" with respect to international labor practices. [19] Since Kasky disclaims personal knowledge of

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[17] *Kasky v. Nike*, 93 Cal. Rptr. 2d 854, 861 (Cal. Dist. Ct. App. 2000).
[18] CAL. CONST., art. I, § 2(a).
[19] *See Kasky*, 93 Cal. Rptr. 2d at 857.

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the actual facts concerning Nike's conduct, it is safe to conclude that his action was motivated solely by his pre-existing animus for Nike. The decision below considers Kasky's moral outrage sufficient basis to pursue an unfair competition claim, "because Nike sells shoes—and its defense against critics may help sell those shoes."[20] Such reasoning is consistent with the existing commercial speech doctrine, because in key precedents this Court has identified economic motives as sufficient to sever "commercial" speech from the First Amendment's protections. Yet such reasoning denies one of Nike's most essential rights; the right to communicate free from government restraint.

If anything, this case exposes the California legislature's error in permitting "private attorney general" actions, such as Kasky's, in the first place. In the context of republican government, a state interest is established after careful consideration, debate, oversight, and review. The legislative process is inherently slow and deliberative, in part to prevent a rush to judgment on matters of public debate. Once laws are enacted, it becomes the responsibility of elected and appointed officials to interpret and execute the laws in a consistent, objective manner. Yet Kasky, a private citizen who alleges no personal injury and professes no personal knowledge of the facts, seeks to interpret a broad anti-fraud statute in order to meet his *personal* interests. This is not the establishing of a valid government interest, but rather an exercise in whim-worship.

Ultimately, the responsibility in this case does not lie with Kasky or the California legislature, but with the California Supreme Court, and indeed this Court as well. The commercial speech doctrine is fundamentally a judicial invention that is little more than case law with "nothing more than policy intuition to support it."[21] In the absence of

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[20] *Kasky v. Nike*, 27 Cal.4th 939, 971 (2002) (Chin, J., dissenting).
[21] *44 Liquormart*, 517 U.S. at 517 (SCALIA, J., concurring in part and concurring in judgment).

Central Hudson, *Bolger*, and the decision below, Kasky has no valid cause of action in the California courts. Kasky's claims find support neither in the plain language of the statutes, the state or federal constitutions nor the common law definition of fraud. Only by clinging to the commercial speech doctrine, as articulated by the California Supreme Court, have Kasky's grievances remained in the judicial arena.

III. The commercial speech doctrine is not necessary to advance the state's interest in preventing fraud.

The remaining issue with respect to overruling the commercial speech doctrine is how such action would affect the state's interest in preventing and redressing fraud. Kasky's underlying argument is that Nike's speech constituted "consumer" fraud. Removing the commercial speech doctrine from Kasky's arsenal obviously destroys this argument, since Kasky himself alleges no personal injury, and can demonstrate no injury to any other individual consumer. But outside the limits of this case, the commercial speech doctrine does not advance the state's ability to prevent fraud because the doctrine is an illegitimate prior restraint on speech, and not a means of identifying and punishing actual fraud. The doctrine is an initiation of force, not protection from it.

Fraud requires, in part, that an injured party be induced to rely on misleading statements to his detriment. Here, Kasky never alleges Nike consumers relied on false statements to their detriment. Instead, he argues that Nike's issue advertising *may* mislead consumers into holding an unjustified favorable image of the company, which in turn *might* lead to sales of Nike products in the future. This is, at best, a tortured definition of fraud. Under Kasky's theory, a consumer would have a cause of action for fraud against Nike despite neither buying Nike shoes, nor ever

considering the purchase of Nike shoes in the future. In essence, Kasky equates simple speech with overt fraud.

By allowing critics such as Kasky to shackle the speech of Nike—creating what amounts to an illegitimate prior restraint—the Court would sanction Kasky's machinations, thus allowing him to manipulate the public into reaching his conclusion, thus denying consumers the right to form independent judgments. This exercise may please Kasky and his fellow Nike opponents, but it does nothing to combat actual fraud.

CONCLUSION

Nike is an innocent victim of this Court's rigid insistence on maintaining the commercial speech doctrine. While the company's grievances could be settled by granting the narrow relief sought in its petition, the Court should protect future Nikes from having to defend themselves from any more judicially-created limits on the First Amendment. This can be accomplished by recognizing that the sovereign citizens of the United States have a constitutionally guaranteed right to speech that is not fraudulent or defamatory. Hence, the commercial speech doctrine must fall.

In the absence of the commercial speech doctrine, Marc Kasky possesses no valid cause of action under California law. The judgment of the California Supreme Court must be reversed, and the Superior Court's dismissal of Kasky's complaint should be reinstated.

Respectfully Submitted,

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Dated: February 28, 2003.

(18)

Supreme Court, U.S.
FILED
FEB 27 2003
OFFICE OF THE CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of neither party with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

STATEMENT

Nike, Inc., is one of the largest manufacturers of sporting apparel and equipment in the world. Nike sells most of its goods in the United States and in the other industrialized countries. But the Corporation does not manufacture its goods in these places.

Nike's production strategy is to subcontract the manufacture of its goods to producers in countries with worse labor conditions and less worker freedom to organize independent trade unions than obtain in the industrialized world. Indeed, Nike has *not* been content to manufacture its goods in countries with *low* labor costs. Rather, Nike relentlessly seeks to place its production in locations with the *lowest* labor costs. When workers in countries where Nike has contracted production succeed in improving their labor—and living—conditions, by organizing a union or otherwise, Nike responds by shifting its production to new locations in countries with worse labor conditions.

Critics of Nike's strategy of locating its production in places with poor labor conditions and repressive political regimes have questioned the fairness of that strategy to the workers who produce Nike goods and to the manufacturing workers in other countries who have achieved better labor conditions. And, those critics have questioned the efficacy to the industrialized countries that import Nike goods of a trade in merchandise produced under abject labor conditions. The public debate is concerned, in the first place, with Nike's own production strategy and with its labor practices and, more broadly, with the similar production strategy followed by a myriad of multinational corporations and with their labor practices.

Nike did not initiate this debate, and the Corporation is far from being an enthusiastic participant. To the contrary, at every step of the way Nike has resisted making public statements about the labor conditions at its production facilities. It

is Nike's critics who have insisted that the Corporation speak on these matters, and it is Nike's critics who have brought to bear the pressure of public opinion to secure disclosure by the Corporation of the identities of its subcontractors, the locations of their production facilities and the labor conditions at those facilities.

The AFL-CIO has taken an active part in the debate over Nike's labor practices—with the object of reforming *both* Nike's practices *and* the foreign trade policies of the United States. We are most assuredly on the other side from Nike in that debate. We vigorously assert that Nike is guilty of unfairly exploiting workers in the production of its goods, of undermining employment opportunities and labor standards both in the United States and overseas, and of weakening the economies not only of this country but also of many developing nations that have sought to improve their workforces' labor conditions. And, we further maintain that Nike's public statements in this regard have, in general, been unforthcoming and unresponsive and have been calculated more to mislead than to inform the public.

From all that appears in the complaint, then, the AFL-CIO stands on the same side of the debate over Nike's labor practices as the plaintiff in this case. Where we part company with the plaintiff, however, is that we are certain that this debate is, and in the interest of the disputants and the public should be, an open free speech debate under the First Amendment and not one subject to legal regulation under the commercial speech doctrine.

SUMMARY OF ARGUMENT

In this case, the California Supreme Court held that statements by Nike, Inc. responding to public criticism of the labor conditions at Nike's overseas production facilities con stitute commercial speech entitled to less First Amendment protection than statements on matters of public concern.

The ruling below raises two issues. The first issue is whether a public debate over labor conditions and labor relations constitutes speech on a matter of public concern entitled to full First Amendment protection. The second issue is whether, if public debate over labor conditions and labor relations does constitute speech on a matter of public concern, the speech of the employer whose labor conditions and labor relations are under scrutiny is entitled to less First Amendment protection than the speech of the employer's critics.

We submit that the answer to the first question is "yes" and that the answer to the second question is "no."

With respect to the first issue, this Court in *Thornhill v. Alabama*, 310 U.S. 88 (1940), clearly held that public statements about labor conditions or labor relations do constitute statements about matters of public concern that are entitled to full First Amendment protection. The California Supreme Court recognized as much, but posited that *Thornhill* had been weakened by the development of the commercial speech doctrine. The California court's theory in this regard is that, under the commercial speech precedents, economically motivated speech is entitled to only limited First Amendment protection. This Court squarely rejected that proposition in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) – and for good reason, as much speech that lies at the heart of the First Amendment is economically motivated.

With respect to the second issue, the California Supreme Court advanced a definition of commercial speech that is calculated to disadvantage the employer side in any public debate over labor conditions and labor relations. That definition conflicts with this Court's definition of commercial speech and offends the First Amendment. The First Amendment is intended to foster debate on public issues that is uninhibited, robust and wide-open on all sides not debate in which one side is inhibited by state regulation that does not apply to the other side.

ARGUMENT

"[S]peech on '"matters of public concern"' . . . is 'at the heart of the First Amendment's protection.' *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)." *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758-759 (1985). "Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the '"highest rung of the hierarchy of First Amendment values,"' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983), citing and quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982), and *Carey v. Brown*, 447 U.S. 455, 467 (1980).

By contrast, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 64-65 (1983). *See Dun & Bradstreet*, 472 U.S. at 759 ("[S]peech on matters of purely private concern is of less First Amendment concern.").

The California Supreme Court held that Nike's public statements "describing its own labor policies, and the practices and working conditions in factories where its products are made" fall into the less protected category of "commercial speech." Pet. App. 22a. "For purposes of categorizing Nike's speech as commercial or noncommercial," said the California court, "it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate." *Id.* at 25a. Nor, according to the court below, does it matter to the court below that the charges against Nike in this regard and the Corporation's responses "were part of an international media debate on issues of intense public interest." *Id.* at 23a (internal quotation marks omitted).

Given the First Amendment's "special protection" for "speech on matters of public concern," the California court's ruling raises two issues:

- The first issue is whether "participating in a public debate" over labor conditions and labor relations that are a matter "of intense public interest," Pet. App. 25a & 23a, constitutes "speech on [a] matter[] of public concern."
- If public debate over labor conditions and labor relations does constitute speech on a matter of public concern, the second issue is whether the participation of the employer whose labor conditions and labor relations are under scrutiny is entitled to less First Amendment protection than the speech of the employer's critics.

As we now show, the answer to the first question is clearly "yes," and the answer to the second question is just as clearly "no."

1. More than sixty years ago, this Court squarely held that "the effective exercise of the right to discuss freely industrial relations which are matters of public concern" is fully protected by the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940).

The *Thornhill* Court stated that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution," because "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." 310 U.S. at 102. As the Court explained:

> "[S]atisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern." *Id.* at 103.

That being so, the Court concluded that "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Id.*

It follows ineluctably from *Thornhill* that the pure speech "dissemination of information" to the public concerning the dispute over labor conditions at Nike's production facilities is most certainly "within that area of free discussion that is guaranteed by the Constitution." 310 U.S. at 102.[2] *See also Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) ("negotiations over the proper level of compensation for teachers . . . were unquestionably a matter of public concern" so that the parties "engaged in debate about that concern" were entitled to full "constitutional protection").

It is very much to the point that Nike's production strategy is a paradigm for a whole class of American corporations.

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[2] We phrase the point in terms of "pure speech," because *Thornhill* itself involved union picketing and because *Thornhill*, unlike subsequent cases, treated that activity as pure speech. After *Thornhill*, this Court came to the view that "picketing is indeed a hybrid" of speech and conduct and that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech." *Teamsters Union v. Hanke*, 339 U.S. 470, 474 (1950) (internal quotation marks & citation omitted). That development in the law has not undermined the holding of *Thornhill* with respect to the protected status of pure speech to the public on labor conditions and labor relations. *See* n. 3, pp. 10-11, *infra*.

Over the past decade, for example, upward of 2 million manufacturing jobs have been lost to the United States, in general to countries with worse labor conditions than those prevailing in this nation. *See* Robert E. Scott, *Where the Jobs Aren't*, EPI Issue Brief # 168 (Economic Policy Institute, Oct. 30, 2001). If "the practices in a single factory [can] have economic repercussions upon a whole region and affect widespread systems of marketing," *Thornhill*, 310 U.S. at 103, the wholesale transfer of manufacturing to countries with the lowest labor costs—and the most repressive political regimes—can have repercussions throughout the entire nation and affect both the national and the international systems for producing marketable goods.

That being so, the purpose of the AFL-CIO and of other Nike critics in engaging the Corporation on this issue is not just to reform Nike's labor practices but to encourage reform through widespread employer action and through governmental action to assure that imported goods are produced under fair—rather than exploitative—conditions. In this context, as in the context in which *Thornhill* itself arose, "[f]ree discussion concerning the conditions in industry" in low labor cost countries is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill*, 310 U.S. at 103.

2. The California Supreme Court, after acknowledging that the debate over labor conditions at Nike's production facilities is a matter of "intense public interest," Pet. App. 23a, suggested that *Thornhill* and the related precedent of *Thomas v. Collins*, 323 U.S. 516 (1945), have been sapped of their vitality by the subsequent development of "the modern commercial speech doctrine," Pet. App. 24a.

While the California court did not vouchsafe a full explanation of how the commercial speech doctrine has eroded the First Amendment protection granted to the public discussion

of labor conditions and labor relations, the theory of the court below appears to be that the commercial speech doctrine makes the speaker's "economic motivation" a key determinant of the level of First Amendment protection. Pet. App. 18a. That followed, in the California court's view, from the basis for according commercial speech only limited protection—that "commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation." *Id.* at 12a (emphasis in original). This Court's decisions belie the California court's view.

(a) On the California Supreme Court's view, the commercial speech cases have not merely limited *Thornhill* but entirely overruled that decision. After all, the union picket whose arrest generated the *Thornhill* decision itself had an obvious economic motivation for "disseminat[ing] . . . information concerning the facts of [the] labor dispute," 310 U.S. at 102, in that he was picketing in support of a strike against his employer, *id.* at 93-94. It is indeed difficult to conceive of any labor dispute in which the disputants' public statements could not be characterized as "economically motivated."

For that and a myriad of other reasons, this Court has squarely held that "the fact that [a speaker] has an economic motivation for [speaking] would be clearly insufficient to turn the [message] into commercial speech." *Bolger*, 463 U.S. at 67. *See, e.g., Eastern R. Presidents Conf. v. Noerr Motors Freight, Inc.*, 365 U.S. 127, 139 (1961). And, *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988), shows that this proposition continues to hold in the context of public speech on labor conditions and labor relations.

DeBartolo involved a "union's peaceful handbilling of the businesses operating in a shopping mall." 485 U.S. at 570.

In response to the use of a non-union contractor by one of the mall's tenants to construct a department store, the union "distribut[ed] handbills asking mall customers not to shop at any of the stores in the mall 'until the Mall's owner publicly promises that all construction at the Mall will be done using contractors who pay their employees fair wages and fringe benefits.'" *Id.* "The handbills' message was that '[t]he payment of substandard wages not only diminishes the working person's ability to purchase with earned, rather than borrowed, dollars, but it also undercuts the wage standard of the entire community.'" *Id.* at 570-571.

The union in *DeBartolo* had an obvious economic motivation for distributing the boycott leaflets. The non-union contractor had displaced a union contractor and thus deprived the union's members work at fair wages. Moreover, the "alleged substandard wages and fringe benefits" provided by the non-union contractor "undercut[] the wage standard of the entire community" and thereby undercut the union's ability to negotiate favorable terms with the contractor's unionized competitors. 485 U.S. at 570-571.

While that was both obvious and true, the *DeBartolo* Court concluded that the leaflets "do not appear to be typical commercial speech such as advertising the price of a product or arguing its merits, for they pressed the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace." 485 U.S. at 576. *See also Babbitt v. Farm Workers*, 442 U.S. 289, 311 n. 17 (1979) (union "appeals directed against the products of agricultural employers whose employees the labor organization did not actually represent" are protected by the Constitution).[3]

[3]To be sure, the respondent claims that "the speech of labor disputants does *not* receive 'full First Amendment protection.'" Brief in Opp. 23 (emphasis in original). But, as we have shown in text, the precedents on the pure speech of labor disputants addressed to the public—which is what is at issue here—do accord such speech "full First Amendment protection." To the extent that "[t]he speech of labor disputants . . . is subject to a number of restrictions," *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 763 n. 17 (1976), what has been restricted is "conduct, though evidenced in part by speech," *NLRB v. Virginia Power Co.*, 314 U.S. 469, 477 (1941). That has been the basis of the restrictions on employer anti-union campaigns addressed to employees. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("[A]n employer is free to communicate to his employees any of his general views about unionism, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'"). And, it is the basis of the restrictions on union picketing. *See Hughes v. Superior Court*, 339 U.S. 460, 465 (1950) ("picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent"). The Court's decisions in this regard rely on the proposition that what is being regulated "is a mixture of conduct and communication" and make clear that "it is the conduct element rather than the particular idea being expressed" that can be regulated. *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980) (Stevens, J., concurring).

By the same token, persons protesting against racially discriminatory hiring practices are animated by just the sort of economic motivations that animated the union in *DeBartolo*. *See, e.g., Talley v. California*, 362 U.S. 60, 61 (1960) (handbills urging "a boycott against certain merchants and businessmen . . . on the ground that . . . they carried products of 'manufacturers who will not offer equal employment opportunities to Negroes, Mexicans, and Orientals"); *New Negro Alliance v. Grocery Co.*, 303 U.S. 552, 557 (1938) (picketing with signs that read "Do your Part! Buy Where You Can Work! No Negroes Employed Here!").

The fact that such protests are economically motivated has not prevented the Court from recognizing that the "right to protest racial discrimination—a matter inherently of public concern" is entitled to full First Amendment protection. *Connick*, 461 U.S. at 148 n. 8. *See, e.g., Claiborne Hardware*, 458 U.S. at 914 ("boycott designed to force governmental and economic change"). *See also NAACP v. Alabama*

ex rel. Patterson, 357 U.S. 449, 460 (1958) ("it is immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religious, or cultural matters").

(b) The California Supreme Court's fundamental error in classifying Nike's statements on labor conditions as commercial speech was that court's single-minded focus on the speaker's "economic motivation." For this Court has defined commercial speech as "expression related *solely* to the economic interests of the speaker *and* its audience." *Central Hudson v. Public Service Comm'n*, 447 U.S. 557, 561 (1980) (emphasis added).

While public speech on labor conditions and labor relations is often "related . . . to the economic interests of the speaker," it is not in the same sense "related . . . to the economic interests of . . .its audience." *Central Hudson*, 447 U.S. at 561.

Nike's public statements about the labor conditions at its production facilities were undoubtedly made to serve the Corporation's economic interests. But—in contrast to Nike statements on its products and their qualities and supposed virtues—the Nike statements on labor conditions were most certainly *not* addressed to the economic interests of the public as consumers.

Rather, Nike's labor conditions statements were addressed to the public's *moral, social and political interests* as members of a complex industrial society in which they act both as consumers who can reflect their personal moral and social beliefs through their purchasing decisions and as voters who can participate in shaping governmental policy on trade and the regulation of commerce. *See Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 534 & n. 2 (1980) ("Freedom of speech is 'indispensable to the discovery and spread of political truth'" and "also protects the individual's interest in self-expression.").

That is *Thornhill*'s point. And, that is why such speech *is* protected as speech on a matter of public concern and *is not* commercial speech.

Contrary to the California Supreme Court's supposition, then, "economic motivation or impact alone cannot make speech less deserving of constitutional protection." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring in judgment).

3. The sum of the matter is that public statements on labor conditions and labor relations exemplify "speech on matters of public concern" and fall "at the heart of the First Amendment's protection." *Dun & Bradstreet*, 472 U.S. at 758-759 (citations and internal quotation marks omitted). The question that remains is whether such statements by an interested employer are, for some reason, entitled to less First Amendment protection than such statements by employees, labor unions or third parties.

The California Supreme Court's holding that Nike's statements are not fully protected rests on the following three part definition of commercial speech:

> "Because in the statements at issue here Nike was acting as a commercial speaker, because its intended audience was primarily the buyers of its products, and because the statements consisted of factual representations about its own business operations, we conclude that the statements were commercial speech for purposes of applying state laws designed to prevent false advertising and other forms of commercial deception." Pet. App. 23a.

The California court made clear that the first two parts of this definition are satisfied whenever an employer addresses the general public. *See* Pet. App. 21a (The term "commercial speaker" covers all "speakers . . . [who] are engaged in commerce," and statements "addressed to the public generally" are considered "intended to reach and influence actual

and potential purchasers."). And, of course, the third step—"factual representations about its own business operations"—will be satisfied whenever the employer is speaking about labor conditions at its own facilities or, as here, at the facilities of the employer's subcontractors.

In the context of a public debate over labor conditions or labor relations, then, the California Supreme Court's definition of commercial speech opens the way to the regulation of one disputant's speech that does not apply to the other disputants. As one of the unregulated disputants, we recognize that this is one-sided and thus patently unfair. And, we recognize as well that, in something of an irony, such regulation can be counterproductive for our own side. In the first place, unbalanced regulation is inherently unstable in that it creates a dynamic—or serves as an excuse—for "more equal" regulation of all the disputants. Moreover, as we explain more fully below, such regulation can have the counterproductive effect of stifling the debate itself.

But be those possibilities as they may, the critical legal point is that such unbalanced regulation in its own terms is anathema to the most basic First Amendment free speech principles. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-786 (1978)(Where a legal rule is so one-sided as to "suggest an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

The First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This commitment reflects our nation's "confidence in the power of free and fearless reasoning and communication" and our belief that "falsehood may be [best] exposed through the processes of education and discussion." *Thornhill*, 310 U.S. at 95. Only such unfettered public debate allows "the people . . . [to]

judg[e] and evaluat[e] the relative merits of [the] conflicting arguments." *Bellotti*, 435 U.S. at 791. *See Consolidated Edison*, 447 U.S. at 534.

These central First Amendment principles leave no room for legal regulation that inhibits the freedom of speech of one of the disputants in a public debate. And, that is true whether the disfavored speaker is an individual, a union, or a business corporation. "The identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas & Electric Co. v. Public Utility Comm'n*, 475 U.S. 1, 8 (1986). For just that reason, "a company" that otherwise engages in commercial speech "has the full panoply of protections available to its direct comments on public issues." *Bolger*, 463 U.S. at 68. *See Consolidated Edison*, 447 U.S. at 533. And, this principle applies to a company's "direct comments" to the public on labor conditions and labor relations to the same degree as to statements on other "public issues."

4. We would conclude by adding a word on the nature of the public debate between Nike's labor critics and the Corporation and on the likely effect on that debate of the California Supreme Court's decision—a word that illustrates the practical wisdom embodied in the First Amendment.

The California Supreme Court's aim, as that court stated it, is to "make Nike [a] more cautious"—i.e., a more responsible and accurate—speaker on the subject of the labor conditions at the Nike production facilities. Pet. App. 22a. *But see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (Requiring a speaker "to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.").

The California court, however, has no power to require Nike to speak on this subject at all. And, citing concerns about legal liability under the California court's decision, Nike has announced that the Corporation will discontinue its recently adopted practice of issuing reports on labor conditions at its production facilities. Nike Press Release of

Oct. 14, 2002, available at www.nike.com/nikebiz/news/pressrelease. Given the dynamics of the debate between Nike's critics and Nike, that step would go well beyond silencing one side toward silencing any meaningful debate.

Nike's production facilities are not located in the United States but in multiple countries throughout the developing world. Indeed, in its relentless search for the lowest labor costs, Nike constantly moves the production of its goods from one subcontractor and one country to another. A first key step in the campaign to expose and improve the labor conditions at the Nike production facilities was, therefore, to mobilize public pressure on the Corporation to identify its subcontractors and the locations of their facilities. After much time and effort, this public pressure finally brought Nike to disclose the names of the subcontractors and the locations of the production facilities involved in manufacturing Nike's prominent line of collegiate athletic apparel.

Another key step in the campaign was to mobilize public pressure on Nike to take public responsibility for the labor conditions at its production facilities. Responding to that public pressure and in order to "foster the appearance . . . of good working conditions in the Asian factories producing its products," Nike: (i) began requiring its contractors "to sign a Memorandum of Understanding that, in general, commits them to comply with local laws regarding minimum wage, overtime, child labor, holidays and vacations, insurance benefits, working conditions, and other similar matters and to maintain records documenting their compliance;" and, (ii) "[t]o assure compliance, the company [began] conduct[ing] spot audits of labor and environmental conditions by accounting firms." Pet. App. 67a.

Nike's commitment to certain labor standards and the Corporation's own reports on subcontractor compliance with those standards have served to focus the public debate on the Corporation's labor standards.

For example, Nike commissioned a report by former United Nations Ambassador Andrew Young on the labor conditions at Nike production facilities. Pet. App. 67a. Ambassador Young toured 12 factories and, in June 1997 issued a report on the labor conditions in those factories. Complaint Exh. EE.[4] Nike publicized the report widely. *Id.* Exhs. Y & FF. In response, various organizations issued detailed criticisms and point-by-point refutations of that report. *Id.* Exhs. C & GG. And, these criticisms of the report were, in turn, reported in the popular press. *Id.* Exh. HH.

In short, in the continuing debate on Nike's labor standards, the Corporation's public statements are not the only word or the last word but rather are part of a continuing dialogue, and, indeed, serve as a catalyst for that dialogue. Nike's withdrawal under legal pressure from the dialogue about the labor conditions at its production facilities serves both to diminish the sources of public knowledge about that matter and to frustrate the debate itself.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted,

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[4] The First Amended Complaint and the attached exhibits are contained in Petitioner's Lodging filed along with the Petition for a Writ *Certiorari*.

(19)

Supreme Court, U.S.
FILED
28
FEB 28 2003

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF *AMICUS CURIAE* PFIZER INC IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pfizer Inc ("Pfizer") is the world's leading research-based pharmaceutical company. Pfizer discovers, develops, and manufactures prescription drugs and other consumer health care products that are marketed worldwide.[1] Because Pfizer scientists and doctors operate at the cutting edge of knowledge in science and medicine, the company possesses a vast body of information relating to health care matters, including the characteristics of its products and the many health conditions they treat, as well as the scientific, economic, and political contexts in which issues surrounding them arise.

Pfizer exercises its First Amendment right to address the public—including physicians who prescribe and patients who use its products—in a number of different ways. The company is a substantial advertiser seeking to disseminate information to promote the sale of its products. Other Pfizer promotional material, such as the company's extensive website, provides considerable factual data on health conditions as well as commercial information about Pfizer products. When it advertises or promotes at its own initiative, Pfizer recognizes that the government has a legitimate interest in regulating the commercial marketplace to ensure that consumer decisions are not distorted by false or misleading commercial information.

Pfizer also speaks out on public health and policy issues that may relate, directly or indirectly, to the company's products and operations. For example, the company

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[1] Pursuant to Sup. Ct. R. 37.6 ("Rule"), Pfizer states that no counsel for a party has authored this brief in whole or in part, and no person or entity other than Pfizer has made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), Pfizer has obtained consent of the parties to the filing of this brief. The requisite consent letter from Respondent Marc Kasky was submitted to the Court on Feb. 14, 2003. Petitioners Nike Inc., *et al.*, filed a blanket consent letter in this docket on Feb. 3, 2003.

comments generally on broad public policy issues through its *Pfizer Forum* series of sponsored editorials and through public statements of its senior officers. In that capacity, Pfizer believes, as this Court held in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), that it should be entitled to the same First Amendment protections as any other speaker.

In addition, Pfizer responds to matters of public concern, as Nike did in the case at bar, through vehicles such as media releases, interviews, and letters to the editor. These responses are not limited to abstract statements on political topics or societal trends but rather typically involve discussion of specific products in the context of news about scientific developments or consumer issues. In the last several months, for instance, mainstream media have tracked test developments concerning the long-term safety of hormone replacement therapy ("HRT") for women. The public discussion has included questions as to whether HRT products different from those tested in a recent groundbreaking study would produce different results. Drug effectiveness also is a matter of public discussion, especially within the scientific community and the specialty media that serve it. For example, the federal government recently published the results of a landmark study designed to compare three different types of drugs used to treat coronary heart disease, thereby touching off ongoing debate in both professional and consumer circles over the results. Pfizer manufactures both HRT products and one type of the heart disease drugs tested. In responding to these debates and protecting its commercial position, the company often enters into areas of scientific controversy involving competing priorities; balancing of risks, costs, and benefits; and other scientific and/or economic trade-offs in which what is "misleading" can be as much a matter of viewpoint as of knowledge.

Pfizer is significantly handicapped in its responses by the threat of action under state laws like the California statute at

issue.[2] The company believes that such handicaps, when applied as in this case, are antithetical to the First Amendment and to the public's interest in being fully informed on important health care issues. Pfizer thus views this case as an opportunity for this Court to secure the First Amendment rights of commercial speakers in addressing matters of public concern that involve their products and operations, subject only to the same governmental restrictions and reviews legitimately imposed on other participants in public debate. Pfizer urges that this Court either (a) adapt the existing commercial speech doctrine set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and its progeny, to give express recognition to a right of equal reply; or (b) clarify its *Central Hudson* criteria to recognize that the governmental interest in safeguarding the commercial marketplace from false and misleading statements is not an absolute exception to the need to examine the strength of that interest in specific circumstances, the means by which that interest is advanced, and the potential overbreadth of its intrusion into protected public debate.

SUMMARY OF ARGUMENT

This case presents a collision between the State of California's claimed interest in protecting its citizens from the adverse influence on commercial transactions of allegedly false and misleading statements and Nike's First Amendment

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[2] Pharmaceutical manufacturers also are subject to extensive regulation under the Food, Drugs & Cosmetics Act of 1906, as amended, with respect to their speech about drug products. *See* 21 U.S.C. § 301 *et seq.* In connection with an inquiry of the Food and Drug Administration concerning the application of existing constitutional principles to FDA speech regulation, Pfizer has recommended formal recognition of a protected right of response. *See* Letter of George W. Evans, Associate General Counsel, Pfizer Inc, to Dockets Management Branch, Food & Drug Admin., Docket No. 02N-0209 (dated Dec. 11, 2002) (attached).

interest in participating as an equal in ongoing public debate on "globalization" issues that potentially affect both its product sales and future governmental actions. The majority of the California Supreme Court sought to resolve this collision by determining whether Nike's speech should be classified as "commercial." Answering in the affirmative, the majority then treated California's regulatory interest as absolute and gave no further attention to Nike's speech rights or to the interests of California citizens in hearing both sides on this matter of public concern. The majority premised its analysis on what it understood—erroneously, Pfizer believes—to be this Court's teaching that states may ban or sanction "false or misleading" commercial speech without regard to the context in which the speech arises or the adverse impact of such state action on the marketplace of ideas.

The decision below leaves Nike, and similarly situated commercial entities, at a dual disadvantage in participating in public debate that involves their products or business operations. First, as a substantive matter, their speech—unlike that of other participants—is subject to liability under the California Business & Professions Code § 17200 *et. seq.* ("Code") if judged false or misleading, with consequent potential for significant economic and criminal penalties. Second, as a procedural matter, this judicial review of their statements under the Code can be triggered at the discretion of their critics. There can be little doubt of the adverse effect that these dual handicaps impose on business participation in the increasingly frequent public debate about products and business operations, and consequently on the process of debate itself. It is equally apparent that this outcome cannot be squared with fundamental First Amendment values or this Court's long endorsement of the process of robust collision of ideas through which truth emerges.

Although the record before this Court demonstrates broad business, media, and public interest group concurrence that the decision below must be reversed, there is far less

agreement on an appropriate rationale. Following the lower court's lead, the parties and most *amici* focused their attention at the *certiorari* stage on the issue of whether Nike's speech should be considered "commercial." They proposed that the Court either abolish the commercial speech category or narrow it in a way that would place Nike's speech outside of it. Pfizer, while not questioning that the commercial speech criteria might usefully be clarified, believes that a different analysis would better meet the issues presented in this case.

Accepting *arguendo* that the subject matter of Nike's speech might trigger a legitimate state interest in regulating the commercial marketplace, Pfizer urges the Court to hold that any such interest still must be weighed against the competing value of vigorous public debate. In order to decide the case on the narrowest basis, the Court should recognize an overriding "right of reply," which would permit commercial entities to meet their adversaries on an equal substantive and procedural footing in a discussion or debate over matters of public concern. This holding would require reversal of the decision below because the lower court, in applying the Code, reached the opposite result. A recognized right of reply would free a commercial entity to fairly protect its interests and inform the public decisional process whenever critics, or the independent editorial judgment of the media, subjected the entity's products, services, or business operations to public scrutiny.

On a broader basis, Pfizer believes that the facts of this case give the Court a unique opportunity to clarify its commercial speech precedents and to harmonize them with more general speech doctrine. The commercial speech label might best be viewed simply as a determination that the content could directly influence the conduct of commercial transactions and thus trigger a legitimate state interest in preventing false or misleading information from distorting those transactions. As with other state interests that the Court has identified in its commercial speech precedents, however, the

suppression of allegedly false or misleading information should not be a paramount interest that forecloses the full *Central Hudson* balancing analysis. Rather, that interest must be weighed, as *Central Hudson* instructs, against countervailing interests in free expression and the value of a clash of positions on matters of public concern. Where, as here, vigorous public debate already exists, the state has at best only an attenuated interest in making its courts—rather than the competition among ideas in that debate—the vehicle for preserving market integrity. Moreover, despite the assumed "hardiness" of the speech, based on the speakers' economic interests and their detailed knowledge of their own products and business operations, permitting an action to go forward under the Code also creates substantial risk of chilling speech which is neither false nor misleading. Application of the operative factors of the Court's *Central Hudson* test to challenged speech restraints in such cases would provide both a basis for reversal here and a better foundation for reconciling state interests in marketplace integrity and competing free expression values.

ARGUMENT

I. THE DECISION BELOW IMPERMISSIBLY FAILS TO ACCORD ANY WEIGHT TO THE PREEMINENT FIRST AMENDMENT VALUE OF FREE AND ROBUST DEBATE ON MATTERS OF PUBLIC CONCERN

The dispute here evolved in circumstances typical of those that often surround other high-profile matters of public controversy. Nike's critics began airing their views publicly in the mid-1990s, linking the company's alleged unfair foreign labor practices with the larger policy debate over "economic globalization." *Kasky v. Nike, Inc.*, 45 P.3d 243, 264 (Cal. 2002), *cert. granted*, 123 S. Ct. 817 (2003). Those criticisms led to a widespread series of media reports that cast a cloud over Nike's image—and fed into discussion about the

need for national or international policy initiatives to address globalization concerns. *Id.* Nike responded to the specific criticism of the company in several ways, including commissioning an independent assessment of its foreign subcontractors' labor practices and issuing press releases and other public statements to rebut its antagonists. *Id.* at 248. All the while, and up through the present day, public debate over globalization continues in "uninhibited, robust, and wide-open" fashion, *see New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), not only through the media but through demonstrations in the streets of many cities across both the nation and the globe.

Mr. Kasky, one of Nike's critics, took a step beyond the usual arenas for public debate by filing suit against the company under the "unfair business practices" and "false advertising" provisions of the Code. *Kasky*, 45 P.3d at 247. The relevant provisions, by their terms, are designed to prevent fraudulent transactions in the commercial marketplace. *See* Code §§ 17200, 17500; *see also Kasky*, 45 P.3d at 249 (recognizing the Code as a "consumer protection law"). Here, the California Supreme Court acknowledged the public debate in which the challenged speech arose but nonetheless focused its legal analysis solely on the question of whether the speech at issue was "commercial." *Id.* at 247. Relying principally on the so-called *Bolger* factors, the majority scrutinized Nike's identity as a business speaker, its economic interests in its products and the image behind them, and the potential customers in the audience toward which Nike's speech was aimed. *Id.* at 254-256 (citing *Bolger v. Youngs Drug Prods. Corp*, 463 U.S. 60 (1983)). The court concluded that Nike's speech was commercial and, as a consequence, subject to unconstrained false-or-misleading review under the Code. *Kasky*, 45 P.3d at 259. The court then terminated its review, without considering how any countervailing First Amendment concerns might weigh in the constitutional balance.

As a result, Nike now faces potential burdens that only it, but not its critics, must bear for airing its views in the public debate. Mr. Kasky is seeking a host of remedies, including, *inter alia*, disgorgement of "all monies" that Nike acquired through its alleged deception, Nike sponsorship of a "Court-approved public information campaign" to remedy the alleged misinformation, and, of course, attorneys' fees. *Id.* at 248. Moreover, because the Code lacks the usual procedural safeguard provided by traditional standing requirements, which ordinarily set actual injury as a condition for maintaining an action, see Code § 17204 (permitting action to be prosecuted by "any person acting for the interests of . . . general public"); Petition for Writ of Certiorari at 3, *Nike v. Kasky* (2002) (No. 02-575) ("Brief of Petitioner") (citing respondent's original complaint conceding no injury or "personal knowledge" of facts), it has, in effect, allowed Mr. Kasky to speak twice in the public debate—first by objecting as a private citizen to Nike's labor practices and then by cloaking himself in the garb of the state to chill the company's response. Nike, in contrast, may speak only once, and then only at the risk of severe sanction.

Were the Court to uphold the ruling below, the decision would severely retard, if not suppress entirely, the ability of any seller of products or services in California to respond to public criticism of its products, services, or business operations if its responses might affect its sales. In addition, because of California's prominence in the national economy, the decision below also would effectively retard speech by business speakers throughout the United States on many matters of public concern. These include the many political topics, societal trends, consumer issues, and scientific developments that affect the perception of product or service quality or of business integrity.

A. Business Speakers Such As Nike Make A Valuable Contribution To Discussion On Matters Of Public Concern That May Implicate Their Products, Services, Or Business Operations

The heart of the ruling below is the notion that the economic motivation of the speaker—in and of itself—is sufficient to determine whether Nike, or any business speaker, has equal freedom to participate with other speakers in debate over matters of public concern.[3] *Kasky*, 45 P.3d at 257. This case does not reprise the question of whether corporations have the same rights as others to speak generally on ballot issues or other broad policy controversies. *See Bellotti*, 435 U.S. 765; *Pacific Gas & Elec Co. v. Public Utils. Comm'n of Cal.* 475 U.S. 1, 8 (1986). Nor does this case call into question the speech rights of businesses in their self-initiated sales efforts. *See, e.g., Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497 (2002). The decision below actually raises a new question for this Court: Even assuming that a business entity's speech on a matter of public concern may affect its sales, should that foreclose a careful balancing of the government's consumer protection interest against the constitutional value of affording all "diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945), equal First Amendment protection when that business entity is contributing to public debate?

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[3] Although the lower court articulates a new three-point definition of commercial speech and defends its rationale at length, *Kasky v. Nike, Inc.*, 45 P.3d 243, 256-259 (Cal. 2002), *cert. granted*, 123 S. Ct. 817 (2003), all elements of the new analysis reduce to economic motivation. This motivation identifies as commercial not only the "speaker" but also the "intended audience" and the "content" of essentially all of the speaker's messages—as well as the speaker's reasons for existing, and speaking, at all. In identifying economic motivation as the linchpin of its commercial speech definition, the lower court latched onto, and extended, one of the defining factors set forth in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983).

The California Supreme Court, struggling with the commercial speech definition, never even considered this question. The Constitution, however, requires it. So, too, does life in the real world. The Court already has been presented with many examples illustrating how business speakers may provide useful input on matters of public concern that involve their products, services, or business operations. *E.g.*, Brief of Amici Curiae of Council of Public Relations Firms, *et al.*, at 5-6, 13-5, *Nike v. Kasky* (2002) (No. 02-575) ("Amicus Brief of Public Relations Firms") (citing, *e.g.*, agricultural products manufacturers' scientific arguments concerning genetic modification of crops, technology companies' opinions on immigration policy as it affects high-tech workers, energy companies' assessments of wind- and solar-power developments). The record also shows that business enterprises are important sources of information and viewpoints for media coverage of such issues, and that these sources may wither if the ruling below stands. Brief of Amici Curiae ABC, Inc., *et al.*, at 4-11, *Nike v. Kasky* (2002) (No. 02-575) ("Amicus Brief of News Media") (noting business trade press warnings about speech liability risks post-*Nike*).

So many public debates today involve what might be considered "business" issues that unnecessary restraints on corporate speech relating to products, services, or business operations would deprive listeners of valuable information that can contribute both to their economic decisions and their understanding of the broader debate. *See, e.g.*, *Pacific Gas & Elec.*, 475 U.S. at 8. Journalists for decades have been trained specifically to use concrete factual examples to illustrate larger policy debates precisely because that approach is an effective device for explaining complex issues to an audience. *See, e.g.*, The Missouri Group, *News Reporting and Writing*, at 265 (1980) ("Specific detail gathered by observant and questioning reporters always wins out over general description."); *id.* at 272 ("telling a story" by focusing on "part of the whole . . . makes large institutions, complex

issues and seven-digit numbers meaningful"). It is therefore nonsensical to suggest that either the media or their business sources can make the best possible contribution to public debate if corporate entities are free to speak only in generalities. *Kasky*, 45 P.3d at 260-261.

Pfizer, as a pharmaceutical manufacturer, is knowledgeable about and interested in many matters of public concern that touch upon the company's expertise. Health issues—including the identification of diseases and conditions, treatment options, research developments, and the cost and availability of health care—plainly are topics of public discussion and debate. To provide the Court with some indication of the scope of public concern over health matters that involve drugs or medical devices, Pfizer has compiled a brief appendix of selected media clippings gathered since October 2002, which cover topics ranging from potential new vaccines to prevent cancer caused by a widespread virus to ongoing disputes about alleged psychiatric side effects of a certain acne treatment. *See* App. at 22a, 25a.

As noted in the Interest of Amicus statement, *supra*, prescription drug products are often topics of intense public discussion. Certainly the scientific data released under the auspices of the National Institutes of Health in July 2002 concerning HRT therapy has evoked widespread discussion in consumer circles, as well as debate in the professional and scientific communities. *See, e.g.*, Gina Kolata & Melody Petersen, *Hormone Replacement Study A Shock to the Medical System*, N.Y. Times, Jul. 10, 2002, at A1; Ceci Connolly, *Doctors Working to Clear the Fog of Hormone Study*, Wash. Post Jul. 28, 2002, at A1; Regina McEnery, *Experts still disagree on wisdom of hormone therapy*, Cleveland Plain Dealer Oct. 8, 2002, at B4; Prithi Yelaja, *More HRT studies in the works*, Toronto Star, Jan. 16, 2003, at K4; Nancy Weaver Teichert, *Confusion persists over menopause care: Hormones or not? Women and doctors search for answers*,

Sacramento Bee, Jan. 29, 2003, at A1; *see also* App. at 9a, 18a. Manufacturers of various HRT products, who have developed and collected extensive data on women's health and the effects of their drugs, can make valuable contributions to that ongoing discussion. *See* Melody Petersen, *Wyeth Criticizes Media Coverage of Hormone Replacement Drugs*, New York Times, Jul. 24, 2002, at C8. Even though these manufacturers have an economic interest in their products, it would serve no constitutional purpose to discourage them from at least responding to, if not initiating, assertions or questions about the risks and benefits of the therapy options—such as weighing the benefits of treating menopausal symptoms and the relative risks of heart disease, cancer, osteoporosis, etc., implicated in the studies. *See, e.g.*, Teichert, *supra*.

The HRT issue also illuminates a significant weakness in the justification for applying lesser First Amendment protection to business speech on matters of public concern. The lower court in *Nike* dutifully recited the long-standing rationale for the greater restraints imposed on commercial speakers: the business speaker is best positioned to know the "truth" about its products and is more likely to persist, because of its economic motivation, in speaking out about them. Kasky, 45 P.3d at 253. Neither rationale works in the HRT context. There is yet no scientific consensus with respect to HRT therapy; scientists and other research professionals are now debating the implications of the 2002 data, while doctors and their patients are discussing whether HRT is advisable based each woman's needs and health profile. Given the ongoing therapeutic ferment, there is no reason to believe that HRT manufacturers would persist in airing their views on the topic in the face of Code sanctions—even though listeners would benefit from that information.

Scenarios like this are not uncommon with respect to other pharmaceutical products or, indeed, any product or service that may implicate evolving scientific developments. For

instance, medical researchers, physicians, and patients currently are discussing and debating the meaning of two head-to-head studies of different hypertension medications. In December 2002, researchers released the results of the largest clinical study of blood pressure treatments ever conducted in the United States. *See, e.g.*, News Release, National Institutes of Health, NHLBI Study Finds Traditional Diuretics Better Than Newer Medicines for Treating Hypertension, (Dec. 17, 2003), available at www.nhlbi.nih.gov/new/press/02-12-17.htm (announcing results of Antihypertensive and Lipid-Lowering Treatment to Prevent Heart Attack Trial, known as "ALLHAT"); David Brown, *Study Calls Diuretics Best Against Hypertension*, Wash. Post, Dec. 18, 2002 at A1. The study centered on comparisons of three alternative types of drugs, one of which Pfizer manufactures. More recently, however, a separate study came up with contrary results: "In what seems to be a classic whipsawing of medical news, a new Australian study appears to contradict conclusions from a recent U.S. trial that found older, inexpensive diuretic medications were just as good or better than costlier new drugs for treating high blood pressure." Ulysses Torassa, *Hypertension study findings in conflict; One says newer, costlier therapies better, the other says older treatments just as good*, S.F. Chron, Feb. 13, 2003 at A4. Professionals reacting to the studies noted that certain population groups seem to respond better to one alternative treatment or another—and made the indisputable observation that the matter is far from resolved. Torassa, *supra* (quoting epidemiologist stating, "I don't think we can sort this out immediately. We'll have to digest it and do some pooling of the data with different studies."); Scott Hensley, *Hypertension Report Disputes Earlier Study*, W.S. Journ., Feb. 13, 2003 (noting "backlash" among some doctors against U.S. study).

Denying full First Amendment protection to drug manufacturer speech on HRT and hypertension therapies would not

result in better consumer or regulatory decisions on the sub jects. It would simply chill the prospects that business information and viewpoints would emerge publicly. This type of outcome, whatever the economic arena may be, would not simply hurt business speakers. Categorically reducing the First Amendment protection afforded to "economically motivated" speech in all instances would deprive listeners of data and opinions on issues that matter to them. It is also unnecessary, in a society that values its free enterprise system, to demean all business speech arising within a public debate simply because it could also redound to the speaker's financial benefit. Courts cannot assume that listeners, when determining for themselves the worth of a particular message, are incapable of taking both the content and the speaker's motivation into account—regardless of whether the situation is a commercial one or not. *See, e.g., Bellotti*, 435 U.S. at 791 n.31 ("The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what the people may hear.") (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

B. First Amendment Principles Generally Applicable To Debates Over Matters Of Public Concern Support Nike's Right To Contribute To The Public Discussion

If the facts here had been assessed solely against the free speech principles that usually apply to discussion on "matters of public concern," *see, e.g., Gertz v. Welch, Inc.*, 418 U.S. 323 (1974); *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the case would not be before this Court now. There is no dispute here that this case arose within the context of a public debate initiated by others—and that the materials at issue are Nike's replies to its critics. *Kasky*, 45 P.3d at 263. In the normal course of public discussion, responses from interested parties are both expected and encouraged because the First Amendment carries a presumption that truth will best emerge from the "collision" of ideas that results from open channels of communication. *See, e.g., New York Times,* 376 U.S. at 266, 269-271 & n.19 (even false statement contributes by bringing about a "clearer perception and livelier impression of truth, produced by its collision with error") (*citing* Mill, *On Liberty* (Oxford: Blackwell 1947), at 15). Should any speech uttered during the debate be false or misleading, the preferred constitutional remedy for exposing it is more speech, rather than less. *See, e.g., Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

The presumption carries particular force in settings such as *Nike*, where multiple speakers are engaged in the discussion. In protecting the conditions required for robust debate to flourish, the Court has repeatedly demonstrated a concern for the concept of the "level playing field." *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *Waters v. Churchill*, 511 U.S. 661 (1994) (termination improper when nurse spoke out on matter of "public concern" involving hospital). This overarching concern encompasses disapproval of discrimination on the basis of speaker identity or viewpoint. *See, e.g., Bellotti*, 435 U.S. at 776; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (improper restraint based on viewpoint); *cf. City of Ladue v. Gilleo,* 512 U.S. 43 (1994) (inequitable regulatory treatment of signs based on content); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (inequitable tax treatment of publications based on content); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same). Accordingly, the Court has repeatedly acted to protect the ability of speakers—both corporate and individual—to discuss matters of public concern without having to confront either direct recrimination or indirect restraint. *See, e.g., Bellotti*, 435 U.S. at 776; *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of NY*, 447 U.S. 530 (1980) (utility allowed to provide bill

inserts on matters of public controversy); *Pacific Gas & Elec.*, 475 U.S. 1 (utility not obligated to carry counter-speech to political editorials inserted in gas bills); *Waters*, 511 U.S. 661; *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr.*, 485 U.S. 568 (1988) (peaceful handbilling by union permitted at shopping mall). The Court's precedent reflects an understanding that the give-and-take process of any dialogue benefits those who listen, as well as those who speak, especially when the debate occurs in a public arena. *Pacific Gas & Elec.*, 475 U.S. 1 (First Amendment "serves significant societal interests wholly apart from the speaker's interest in self-expression"); *Bellotti,* 435 U.S. at 776 ("The Constitution often protects interests broader than those of the party seeking their vindication.").

Under these general First Amendment principles, there is no justification for the state to suppress one side of the debate over Nike's labor practices abroad or the larger issue of globalization generally—although that is precisely what the Code, as applied by the court below, would permit. *Kasky v. Nike*, 79 Cal. App. 4th 165, 175 (2000) ("Though drafted in terms of commercial speech, the complaint in fact seeks judicial intervention in a public debate.") No one contends here that the Code was designed to police discussion on matters of public concern. Both sides have access to the public arena to air their views and the facts they offer to support those views. The public would benefit from exposure to robust debate on the issues. There is no reason to believe that listeners would be unable to take the interests of speakers, economic or otherwise, into account in evaluating for themselves the merit of the information and ideas being exchanged—which the Court has recognized they can do even when confronted with direct sales pitches. *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 105 (1990) (rejecting notion that recipients of commercial speech "are no more discriminating than the audience for children's television"). There also is no reason to believe that

any arguably false or misleading information would be left unrebutted in the course of this ongoing debate, just as occurs in discussions of other matters of public concern. *See* Amicus Brief of News Media at 18-20 (news coverage calling certain Nike assertions into question). In short, from the public debate side of the collision of interests presented in this case, there is no justification for the State of California, or persons acting in its stead, to determine whether some speakers' assertions are so untrustworthy that they must be suppressed, or punished, while allowing other speech to flow freely. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 791 (1988) ("the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners . . .").

II. THE COURT SHOULD RESOLVE THIS CASE BY ESTABLISHING A MEANS OF BALANCING THE GOVERNMENT INTEREST IN REGULATING THE COMMERCIAL MARKETPLACE AGAINST THE CONSTITUTIONAL VALUE OF ROBUST DEBATE ON MATTERS OF PUBLIC CONCERN

The potential chilling effect of the decision below has prompted a host of interested entities, including several that do not often find common cause, to combine in urging this Court to reverse the California Supreme Court's decision. Most follow that court's lead by focusing on the commercial speech definition but, in so doing, part company on how best to reach the desired outcome. *See, e.g.,* Brief of Amicus Curiae Center for the Advancement of Capitalism at 9-12, *Nike v. Kasky* (2002) (No. 02-575) (repudiate the commercial speech doctrine entirely); Amicus Brief of News Media at 12-15 (define commercial speech as only that which "does no more than propose a commercial transaction"); Brief of Petitioner at 21, 25 (suggest defining commercial speech as only that which refers to a specific product or service); Brief of

Amicus Curiae U.S. Chamber of Commerce at 10-11, *Nike v. Kasky* (2002) (No. 02-575) (distinguishing "business operations" from "product or service").

Pfizer recognizes that the harms to public debate arising from the decision below could be avoided by defining Nike's statements as something other than commercial, thus placing them constitutionally beyond the reach of the Code. Yet a narrowed definition, or outright rejection, of the state's interest in regulating commercial speech could also devalue California's legitimate interest in regulating commercial transactions. Pfizer recognizes that fair and honest commercial dealings are the foundation of a healthy free enterprise system, and the government has a role to play in policing that marketplace. Because consumer protection is a valid government concern, a failure to recognize the state interest in regulating commercial speech would not be warranted.

Further efforts to define commercial speech, however, would simply resurrect old problems or create new ones. The suggestions offered here illustrate that point by simply adding potential complications to the existing ambiguities. Defining commercial speech as that which does no more than "propose a commercial transaction" begs the question that has bedeviled the Court for years: What constitutes a proposal? Should it always require the use of the term "buy" or the inclusion of a price term? Does form matter, or context? The potential variants are daunting. Against that prospect, there may be some surface appeal to the idea of limiting the commercial speech label to only those communications that explicitly refer to a product or service. But that alternative sweeps too much high-value speech into diminished constitutional protection. Many legitimate matters of public concern do involve actual products and services. *See supra* Section I.A; Appendix. Furthermore, contrary to the conclusion of the court below, *Kasky*, 45 P.3d at 260-61, the public "concern" often cannot be discussed sensibly without reference to those products or services. *See, e.g.*, Amicus

Brief of Public Relations Firms at 11-13 (Tylenol/cyanide tampering incident and its subsequent impact on product packaging of many kinds). A similar infirmity infects the notion that discussion of "business operations" could somehow be easily segregated from discussion of products or services. Business operations that become a matter of public concern often may be bound up in the development of products or services, see Amicus Brief of News Media at 3, 6-7, such as the testing that leads to the creation of new foods or drugs. *See* App. at 25a, 32a. The distinction is too easily blurred to be definitive.

Pfizer believes that the decision below can be reversed without either attempting again to perfect the commercial speech definition or substantially overhauling the *Central Hudson* balancing test. Set forth below are two alternatives that share a common foundation: both recognize that cases such as *Nike* present competing interests that warrant a more careful balancing assessment than the California court undertook here. The government's interest in safeguarding the commercial marketplace from false and misleading statements cannot, in every circumstance, trump the competing value of vigorous public debate on matters of public concern. On the other hand, the government's consumer protection goals also are worthy of consideration in circumstances where a business speaker's messages may directly affect sales of its products or services. Weighing these interests under the facts presented by any particular case would better serve both interests.

Applying a balancing approach to cases such as *Nike*—whichever mechanism is chosen—would comport with much of the Court's *Central Hudson* precedent as well as other free speech jurisprudence. The weighing of competing interests is, of course, common in First Amendment law generally. *See, e.g., Gertz*, 418 U.S. 323 (balance in defamation tips in favor of speech freedom when plaintiff thrust into matter of public controversy); *Dun & Bradstreet v.*

Greenmoss Builders, 472 U.S. 749 (1985) (balance in defamation tips back toward plaintiff in matters of only private concern); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, n. 16 (1987) (characterizing commercial speech doctrine as one of several First Amendment balancing tests). Similar balancing is employed even in cases that pit the economic goals of otherwise valid government statutes against First Amendment rights. For example, the Court has determined that federal antitrust restraints must give way when they threaten to prevent the exercise of First Amendment rights to petition the government for redress of grievances. *See, e.g, E. R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), *Mine Workers v. Pennington*, 381 U.S. 657 (1965); *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (2002). In such cases, though the antitrust restraints serve a valid government interest in ensuring the competitive operation of the commercial marketplace, the statutory regime cannot be used to bar persons from making coordinated efforts to lobby the legislature—even in pursuit of legislation that would hurt competitors—or pursuing good-faith court challenges to competitors. *Noerr*, 365 U.S. at 137 (Court will not "lightly impute to Congress an intent to invade . . . freedoms" protected by the Bill of Rights); *Pennington*, 381 U.S. at 664. Similarly, valid government concerns for personal privacy are not sufficient to foreclose completely any reasonable door-to-door efforts to engage in religious or political advocacy or to solicit charitable donations. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002); *Hynes v. Oradell*, 425 U.S. 610 (1976); *Martin v. Struthers*, 319 U.S. 141 (1943). The government's interest in protecting the fairness of commercial transactions is, of course, valid, but it is not different in kind from these other interests that the Court has weighed against the constitutionally protected benefits of free speech.

A. The Court Should Recognize, At A Minimum, A Constitutional "Right Of Reply" That Would Allow Business Speakers To Respond To Criticism Of Their Products, Services, Or Business Operations Publicly Raised By Third Parties

A direct way to address the competing interests presented here would be to craft a specific mechanism to protect public discourse. Unnecessarily handicapping a business speaker from responding to public attacks on its products, services, or business operations encroaches on widely cherished notions of fundamental fairness in addition to the level playing field concept that underlies basic First Amendment principles. *See supra* Section I.B. Even if such responses might benefit the speaker's sales, that effect does not negate or outweigh the contribution that the speaker can make to public understanding of the issues under discussion. *See, e.g., Bellotti*, 435 U.S. at 777 ("the inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual").

Pfizer therefore believes that, absent broader doctrinal changes, the Court should afford commercial speakers in these circumstances a constitutional "right of reply" that carries the same full First Amendment protection enjoyed by the noncommercial entities in the debate. This limited safeguard would serve the rights of both speakers and listeners. By guaranteeing that all speakers enjoy equal freedom to discuss the issues, the safeguard would properly resolve this case; the Code's liability standard would not automatically apply to Nike's rebuttals and effectively cut off the public debate prematurely. Instead, in this case and others like it, a right of reply would help foster the best possible dialogue on matters of public concern, thereby safeguarding the process of public debate upon which our government policymaking ultimately depends. *Id.* at 783; *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587 (1980) ("the First

Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government").

A right of reply would also dovetail with the First Amend ment value accorded to the process of dialogue generally, even in commercial speech cases. The "lesser" protection afforded to commercial speech is in some tension, as a conceptual matter, with situations that involve significant interchanges between two or more speakers. Advertising typically is perceived as one-way communication: the seller speaks to potential consumers. Government consumer protection policy is predicated on the premise of unlevel playing field; the power that sellers derive from their greater financial resources and knowledge about their wares, see *Kasky*, 45 P.3d at 257-58, supports the imposition of additional legal constraints upon them to protect consumers. Nearly all of the Court's commercial speech cases fit the "one-way speech" paradigm, whether the identified government interest was traditional consumer protection or not. *See, e.g., Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (newspaper ads); *Bolger*, 463 U.S. 60 (direct-mail flyers); City of *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (course catalogs); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (package labels); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (placards and billboards); *United States v. Edge Broad.*, 509 U.S. 418 (1993) (broadcast commercials); *Greater New Orleans Broad. Ass'n. v. United States*, 527 U.S. 173 (1999) (same); *Virginia State Bd. of Pharmacy*, 425 U.S. 748 (unspecified form of "advertising"); *Cent. Hudson*, 447 U.S. 557 (same); *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation Bd. of Accountancy*, 512 U.S. 136 (1994) (same); *Western States*, 122 S. Ct. 1497 (same). The few cases involving exchange of views, however, required a balancing of the state's asserted interest in marketplace integrity, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447

(1978), or institutional integrity, *Board of Trustees of the State University of N.Y. v. Fox*, 492 U.S. 469 (1989), against the potential suppression of useful information. Indeed, in *Edenfield v. Fane*, the Court specifically acknowledged the ability of consumers to filter commercial communications and evaluate them in "rational and considered decision making." 507 U.S. 761, 775 (1993).

In broader public debates, a right of reply would enhance listeners' ability to obtain information useful to them both as consumers and citizens. Furthermore, because the right of reply would be triggered only when a third party criticizes a commercial entity, the potential seems negligible that a commercial speaker would induce criticism in order to launch a false or misleading response. The initial criticism of the business entity—as well as later critical rebuttals—creates a substantial commercial risk. In any event, the debate itself serves to alert consumers that certain issues involving the enterprise are in dispute, leaving them free to act as they see fit.

Recognition of a right of reply would not open the door to abuse. There should be no fear about the courts' ability to limit the safeguard by determining whether the response addresses legitimate matters of public concern; they already do so in other First Amendment contexts. *See e.g., Gertz*, 418 U.S. 323 (defamation legal standard turns on whether issue is private or public concern); *Bartnicki*, 532 U.S. 514 (media may publish surreptitious wiretap on matter of public concern). Courts also are quite capable of distinguishing a valid exercise of First Amendment reply rights from situations in which a speaker may attempt to use the safeguard, once triggered, to avoid valid consumer protection regulation. In analogous settings, the courts have successfully dealt with similar evasive or abusive use of the First Amendment as a defense against legitimate economic regulation. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (rejecting "sham" claim of *Noerr-Pennington*

protection of First Amendment right to petition); *BE & K Constr.*, 122 S. Ct. at 2396 ("while genuine petitioning is immune from antitrust liability, sham petitioning is not").

To assist lower courts in this task, the Court could specify consideration of several factors likely to be relevant in most, if not all, cases where a right of reply is asserted. In Pfizer's view, courts might properly review three principal factors. The first would be specificity, *i.e.*, does the speech directly relate to the message to which the business speaker is responding. The second would be proximity, *i.e.*, is the speech disseminated reasonably close in time to the initial message that prompted the response. The third would be proportionality, *i.e.*, is the speech reasonably directed to the audience exposed to the initial criticism and does it exclude references to products, services, or business operations not germane to the identified public concern.

Recognition of a right of reply within the existing *Central Hudson* framework would level the playing field for all speakers participating in debates concerning important public issues. It also would help to eliminate the chill imposed by the mere threat of litigation under the Code, because it should allow many challenges to business participation in public debate to be dismissed on preliminary motion, in a manner similar to the use of the "public figure" defense in defamation actions. *See, e.g., id.* at 2401 (citing *New York Times*, 376 U.S. at 279, as example of procedural mechanism affording needed "breathing space" First Amendment requires). The right of reply therefore would serve fundamental First Amendment values both substantively and procedurally.

B. Alternatively, The Court Should Clarify That The Government Interest In Protecting the Fair Functioning of the Marketplace Is Subject To Complete *Central Hudson* Analysis Before Sanctions May Be Imposed On Commercial Speech Addressing Matters Of Public Concern

Should the Court wish to address larger doctrinal issues, this case offers an excellent opportunity to explain that determining that commercial speech is neither false nor misleading is not a predicate step to application of the full balancing analysis embodied in *Central Hudson*. In other words, allegations that the speech at issue is false or misleading should not create an absolute exception to the need to examine the strength of the government's consumer protection interest in the specific circumstances, the means by which that interest is advanced, the potential for less restrictive measures to alleviate any legitimate concerns about deception, and the countervailing risk of suppressing truthful speech of "public value." Restating *Central Hudson* to clarify that suppression of deceptive commercial speech is a legitimate government interest which must be weighed in the balance—like any other valid government interest—would do little more than describe how this Court, and subordinate ones, have been handling contentions that commercial speech can be sanctioned as false or misleading. *See, e.g., Edenfield*, 507 U.S. 761; *Ibanez*, 512 U.S. 136; *Revo v. Disciplinary Bd. of the Sup. Ct. for the State of N.M.*, 106 F.3d 929 (11th Cir. 1997).

As demonstrated below, an accurate understanding of the essential teaching of *Central Hudson* and later precedent would have caused the California Supreme Court to affirm dismissal of Mr. Kasky's claims. The California court, however, simply took as a given that the state had plenary constitutional power to ban or sanction "false or misleading" commercial speech in all circumstances. It was than forced to

wrestle with the difficulties presented by the facts solely by analyzing the scope of "commercial speech." Kasky, 45 P.3d at 247. In seeking to extend that scope to preserve what it deemed the state's legitimate regulatory interest—*i.e.*, preserving the integrity of commercial transactions where a commercial speaker addressed its potential customers on issues affecting sales—the court below stopped short of even considering how application of the Code would affect the contribution of Nike's non-misleading speech to overall public debate and whether less restrictive means of protecting California's regulatory interests were available. The critical paradigm of *Central Hudson*, by contrast, requires a careful balancing of those competing values. *See, e.g., Ibanez*, 512 U.S. at 143 ("[t]he state's burden is not slight"); *Edenfield*, 507 U.S. at 768-69 (need to consider impact of restriction on protected speech).

While this Court has said that false or misleading speech plays no legitimate role in the commercial marketplace, it has never explained why pursuit of the regulatory objective of protecting consumers from deception should trump paramount First Amendment values. *See, e.g., Cent. Hudson*, 447 U.S. at 565; *Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328, 350 (1986); *Edge Broad.*, 509 U.S. at 429. In *44 Liquormart, Inc. v. Rhode Island*, the Court declared that "the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions." 517 U.S. 484, 499 (1996). Thus, regulation to guard against consumer deception plainly serves legitimate state interests, as do regulations to guard against intemperance (*44 Liquormart*, 517 U.S. 484; *Rubin v. Coors*, 514 U.S. 476); prevent unauthorized distribution of unapproved new drugs (*Western States*, 122 S. Ct. 1497); maintain professional relationships (*Ohralik*, 436 U.S. 447; *Edenfield*, 507 U.S. 761); and protect street safety and aesthetics (*Discovery Network*, 507 U.S. 410). Nothing in logic or this Court's precedent, however,

justifies elevating anti-deception interests above all other legitimate state interests for purposes of *Central Hudson* analysis.

Indeed, building upon the teaching in *Central Hudson* that the government may not "completely suppress information when narrower restrictions on expression would serve its interest as well", 447 U.S. at 565, this Court and lower courts have limited state power to act against speech which, while potentially misleading, could be made accurate by additional disclosure. *See In re R.M.J.*, 455 U.S. 191, 205 (1982) ("states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that it is not deceptive."); *see also Peel*, 496 U.S. 91; *Bates*, 433 U.S. 350; *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999); *cf. Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466 (1988). In addition, claims of "false or misleading" speech have been rejected where challenged statements "were in fact easily verifiable . . .", *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct.*, 471 U.S. 626, 645 (1985); see also *Edenfield*, 507 U.S. at 772, and the Court has further restricted state power to use the "paternalistic assumption that the recipients of [advertising] are no more discriminating then the audience for children's television." *Peel*, 496 U.S. at 105; *see also Ibanez*, 512 U.S. at 137. Finally, in *Edenfield*, the Court identified "ensuring the accuracy of commercial information in the marketplace" as a "substantial state interest" and expressly required that the state's assertion of that interest be weighed against other *Central Hudson* factors when the facts of the case indicated that "truthful and non-misleading expression will be snared along with the fraudulent or deceptive commercial speech." 507 U.S. at 768-69. Thus, any assumption that prohibiting deceptive commercial speech is an absolute constitutional value cannot be supported.

To recognize this evolving jurisprudence, the Court now should make plain that a determination or allegation that speech affecting commercial transactions is false or misleading constitutes the beginning, rather than the end, of the First Amendment analysis. The state's interest in preventing commercial deception must still be assessed, as *Central Hudson* teaches, for substantiality in the relevant circumstances and balanced against the competing free speech values of the dissemination of non-misleading information and the contributions of that information to vigorous public debate—while also taking into account the availability of less speech-restrictive means of advancing the state's interest. *See id.*; *Western States,* 122 S. Ct. at 1503. If competing values outweigh the relevant state interest, First Amendment jurisprudence makes clear that the tolerance of some deceptive information is a necessary price for the protection of greater interests. *New York Times,* 376 U.S. 254; *Gertz*, 418 U.S. 323; *cf. Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 774 (1986) (even in "private figure" defamation, evidentiary burden placed on plaintiff because "constitutional requirement of fault supersedes . . . common law's presumptions as to fault and damages").

In short, this case provides the Court an opportunity to establish the universality of the *Central Hudson* balancing approach across all commercial speech cases. In so doing, the Court also would harmonize its commercial speech doctrine with mainstream First Amendment analysis, where the weighing of asserted state interests against the values of free expression is commonplace. *See, e.g., Watchtower Bible*, 536 U.S. 150 (free speech and religious liberty v. privacy); *New York Times*, 376 U.S. 254 (personal reputation v. public debate); *Texas v. Johnson*, 491 U.S. 397 (1989) (patriotic symbolism v. criticism of government); *United States v. O'Brien*, 391 U.S. 367 (1968) (maintenance of military draft system v. criticism of government).

Applying the *Central Hudson* balancing analysis to the case at bar makes clear that the decision below must be reversed and the complaint dismissed on First Amendment grounds. Even assuming, as pleaded by Mr. Kasky, that Nike's descriptions of its foreign labor practices were false and misleading and therefore could deceptively induce consumers to buy the company's products, the state interest in suppressing this deception is attenuated for three important reasons. First, because there is ample counter-speech in the marketplace of ideas, which gives listeners a more sophisticated appreciation of the facts, the need for state interaction to "set the record straight" on their behalf is limited at best. Second, because the Nike statements at issue do not directly advocate purchase of the company's products and relate only remotely to consumer purchasing decisions, the state's consumer protection interests are further limited. Third, because the proceedings were initiated without regard to actual deception or consumer injury, the state interest is concomitantly reduced.

California's limited interest in suppressing Nike's allegedly deceptive speech is potentially advanced by the Code—via a number of draconian remedies, including injunction and orders for massive restitution. Yet while these remedies might be said to "directly advance" California's consumer protection interest, there is no basis for holding them to be appropriately tailored to First Amendment interests. *See, e.g., Western States,* 122 S. Ct. at 1507. First, in circumstances where counter-speech is readily available, First Amendment values counsel reliance on the collision of ideas and the good sense of listeners rather than the judgments of state officials to prevent deception. *See, e.g., New York Times*, 376 U.S. at 270 (discussing "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Riley*, 487 U.S. at 791 ("free and robust debate cannot thrive if directed by the government"). Second, when public controversy inevitably means that fact

statements, judgments, and policy views will be intertwined, there is a substantial risk that Code remedies will suppress the latter with the former, contrary to this Court's rejection of over-inclusive deception remedies. *See, e.g., Edenfield*, 507 U.S. 761. Third, actual cases of detrimental consumer deception could be dealt with under a better-tailored California conduct remedy. A more precisely framed statute would provide a cause of action to an injured consumer where the gravamen of the complaint would be an intentional attempt to market fraudulently by, *inter alia*, the knowing or reckless use of false or deceptive statements to affect consumer behavior. Requiring both actual consumer injury and the defrauding of consumers through intentionally false statements—two criteria which Mr. Kasky's complaint cannot meet—would adequately safeguard California's interest in protecting consumers against classic deceptive advertising and promotion while also giving public debate over business-related issues the breathing space it needs to flourish.

In addition, addressing *Nike* through this clarification would have essentially the same procedural effect as recognition of a constitutional right of reply proposed *supra* Section II.A. Disputes could often be resolved early in the adjudicatory process, thereby forestalling the additional chilling effect posed by the threat of prolonged litigation.

CONCLUSION

Pfizer believes that the facts of this case afford the Court an extraordinary opportunity to accommodate both general First Amendment principles and legitimate state interests in commercial regulation by recognizing a constitutional "right of reply" or by clarifying the universal application of the *Central Hudson* balancing analysis. For reasons set forth above, Pfizer respectfully requests this Court to reverse the judgment below and order that the complaint be dismissed.

Respectfully submitted,

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February 28, 2003

APPENDIX

Pfizer Inc
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December 11, 2002

Dockets Management Branch
Food and Drug Administration
5630 Fishers Lane
Rockville, MD 20852

Re: First Amendment Issues
Docket No. 02N-0209.

Dear Sir or Madam:

Pfizer Inc ("Pfizer") hereby submits (Exhibit A) proposed regulations concerning one facet of the Food and Drug Administration's ("FDA's") First Amendment inquiry—a sponsor's right to respond to public statements by an independent third party concerning a drug that is subject to an approved or pending New Drug Application ("NDA") or Investigational New Drug ("IND") application. This is a particularly important and timely issue given the pending Supreme Court certiorari petition in *Nike v. Kasky,* 71 U.S.L.W. 3319 (Oct. 16, 2002). In that case, the petitioner seeks clarification of the circumstances in which a manufacturer's response to third-party attacks constitutes speech subject to strict scrutiny under the First Amendment, rather than commercial speech subject to intermediate scrutiny. Pfizer believes that providing FDA with specific proposed regulatory language safeguarding a manufacturer's right to respond to such third party attacks will assist the agency in considering whether and how to amend its regulations or guidances in order to conform with First Amendment principles. It will also demonstrate that

codification of First Amendment principles is a feasible and natural outgrowth of the agency's current constitutional review and should be aggressively pursued by FDA. Although Pfizer has illustrated its proposal in the form of draft regulations, it would be equally appropriate for FDA to incorporate these safeguards in the form of a guidance.

Pfizer observed in its initial comments that the First Amendment embodies a "presumption that truth will best emerge from the collision of ideas that results from open channels of communication" and that "more speech," rather than less, is the best remedy for exposing misleading speech. Comments of Pfizer Inc. at 44 & n.155 (Sept. 13, 2002) ("Pfizer Comments") (quoting *Whitney v. California,* 274 U.S. 357, 377 (1927), *overruled in part, Brandenburg v. Ohio,* 395 U.S. 444 (1969)). These principles apply with particular force to prescription drugs. "Given the benefit and risk calculus involved in the use of any drug, there is ample room for public debate over drug use and constitutional value in letting all speakers play an equal role in that debate." Pfizer Comments at 45. Thus, First Amendment interests are best served when all interested speakers are allowed an equal opportunity to debate publicly the merits and risks of a drug product. This is at least as important—perhaps even more important—than a debate about the ethics and legality of Nike's labor practices in third world countries at issue in the *Kasky vs. Nike* case.

As Pfizer stated in its initial comments, however, FDA's current regulations single out drug manufacturers as the only class of speakers who cannot join freely in this public debate. Instead, manufacturers are governed by "pervasive, extensive regulations that tightly control what manufacturers may say about their products and attempt to transmogrify advertising and other promotional communications into comprehensive instructional messages." *Id* at 111. "FDA, by requiring manufacturers to include an exhaustive list of a product's

risks as well as its benefits, . . . hampers drug manufacturers' ability to respond truthfully to attacks on their products." *Id.* at 113.

The agency's regulations appear to be premised on the concept that the manufacturer is the only speaker concerning its drug product and that regulating manufacturer speech is the sole means of ensuring that physicians and consumers are fully advised about drug benefits and risks. This is largely not the case. There are myriad speakers—from medical journals to patient advocacy groups to HMO benefits managers to dietary supplement manufacturers—each of whom has differing motivations in initiating public debate concerning various prescription drugs and different messages that they would like to convey *Id.* at 12-13. Once debate is initiated by an independent third party, the First Amendment commands reliance on the clash of conflicting views rather than government regulation to establish the truth. Thus, "[it] simply serves no public health purpose to inhibit a manufacturer, who is likely to be the most knowledgeable source of scientific data concerning a particular drug, from providing useful information about the drug when that drug's utility is thrown into public controversy by a third party." *Id.* at 115.

Pfizer's proposed regulations seek to level the playing field by affording manufacturers the right to respond to independent third party statements about their products without subjecting these responses to FDA's stringent prescription drug labeling and advertising requirements. Such speech is not properly characterized as labeling or advertising because physicians will not rely on it to ascertain the operative instructions for the safe and effective use of a product. *See id.* at 71-74. Nor can the speech be deemed commercial speech. Far from doing "no more than propose a commercial transaction," such speech constitutes the same type of scientific debate that others initiated concerning a

particular drug product. *See Pittsburgh Press Co. v Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). As neither labeling nor advertising, but rather scientific speech, such responses should benefit from full First Amendment protection.

Pfizer has carefully crafted its proposed regulations to ensure that manufacturers cannot evade FDA's requirements by characterizing statements as responsive, when they are not or when a response is knowingly or recklessly is false. For example, where a manufacturer knows that it is making a false statement or has serious doubts about its truth, that speech remains fully subject to FDA's otherwise applicable advertising and labeling requirements. Similarly, if the agency can establish that the speech at issue is not the type of responsive speech that the proposed regulation intends to cover because, *inter alia,* it does not respond to a specific statement made by another concerning a product, is not made in reasonable proximity to the time at which the need to respond to the public criticism of the drug arises, or is disproportionate in scope and in the extent of dissemination to the initial third party statement, FDA may subject that speech to its labeling and advertising regulations. These anti-evasion principles are borrowed from the law of self-defense, and would permit the manufacturer effectively to defend its products in the crucible of public debate on the same constitutional footing as the myriad other speakers in the marketplace.

Pfizer urges the agency to consider carefully the proposed regulations and to amend its regulations and guidances to reflect the approach taken in Pfizer's proposal. By so doing, FDA will remedy the inequity that currently exists between unregulated entities, who may attack drug products at will without being subject to any speech restrictions, and manufacturers, who are arguably in the best position to disseminate information concerning their products but who,

under current regulations may risk enforcement action if their response is not tightly controlled in ways that largely dilute the force of the communication without measurably enhancing the truthfulness of the message conveyed.

Respectfully submitted,

PFIZER INC

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Exhibit A

Pfizer's Proposed Right of Response Regulation or Guidance

NDA and IND Holder's First Amendment Right of Response

Section 202.901. Constitutional Exemption for Sponsor Responses to Public Debate.

Where the sponsor of a pending or approved NDA or IND for a prescription drug disseminates statements in response to public statements disseminated by an independent third party which concern the nature, quality, utility or characteristics of that drug, including but not limited to safety or effectiveness, FDA shall not deem those statements to be labeling or advertising as defined, respectively, in 21 U.S.C. § 321(m) and Section 202.1(1)(2) of these regulations. FDA has determined that the First Amendment bars the agency from subjecting such responsive elements of public debate to any of the requirements governing prescription drug labeling or advertising under the Federal Food, Drug and Cosmetic Act or FDA's implementing regulations.

Section 202.902. Anti-Evasion Safeguards.

(a) The exemption in Section 202.901 for responses to third-party statements shall not be used to evade independent otherwise applicable labeling and advertising requirements. In determining whether a communication is a responsive communication protected by Section 202.901, the Commissioner shall take the following factors into account:

1. Specificity. Whether the communication addresses with specificity, by identifying time and place, and, if applicable, title or subject matter of the relevant publication or utterance,

the third party statements about the nature, quality, utility or characteristics of the sponsor's drug to which it responds.

2. Necessity. Whether the communication identifies with particularity the need to respond to the relevant third party statements for the benefit of the audience.

3. Immediacy. Whether the communication is disseminated in reasonably close proximity in time to the relevant third party statement given the nature of the media utilized in responding and the requirements for advance commitments for space and the like. The need to respond may arise, *inter alia,* (a) at the time a third party statement is disseminated; (b) at the time that the sponsor reasonably learned about the statement; or (c) at the time the statement becomes a matter of serious public importance due to, for example, greatly expanded public dissemination.

4. Proportionality. Whether the scope and dissemination of the communication is proportional to the dissemination of the relevant third patty statement to which it responds. The scope of the communication is proportional if it is reasonably tailored to address the representations in the third party statement. The dissemination of the communication is proportional to the dissemination of the public criticism if the audience reach and frequency of publication of the media used to respond is comparable to the audience reach and frequency of the media used to disseminate the criticism in the first instance.

(b) A statement shall not be deemed to be covered by Section 202.901 if the Commissioner establishes that the sponsor disseminated it with actual knowledge that a representation of fact was false or with substantial awareness of its probable falsity or a serious doubt about its truth.

Authority: United States Constitution, Amendment I.

THE NEW YORK TIMES, SUNDAY, NOVEMER 10, 2002

Menopause Without Pills: Rethinking Hot Flashes

This article was reported by Gina Kolata, Milt Freudenheim and Robin Marantz Henig and was written by Ms. Kolata.

In the few months since a study of a widely used hormone regimen found that its risks outweighed its benefits, the prevailing view of menopause has undergone a momentous shift.

For decades, women have been told that the symptoms of menopause—hot flashes and night sweats as well as vaginal dryness that could make sex a painful ordeal and libido a distant memory—were burdens they should not have to bear. With hormone therapy, they would feel like the clock was turned back. At the same time, they could protect themselves against osteoporosis, and probably even reduce their risk of heart attacks and strokes.

When the study, known as the Women's Health Initiative, was halted in July, many doctors changed their message. Try to live with your symptoms, these doctors now say. Or find other ways to deal with them. And forget about using hormones solely to protect yourself from diseases; there are other, better ways.

It is an almost unheard of transformation of the medical landscape, said Dr. Barbara J. Turner of the University of Pennsylvania, who studies the pace of innovation. Doctors "turned on a dime," she said.

But it is impossible to tell how many patients turned with them, and what happened when they did.

There is no obvious pattern of responses to the new reality. In interviews, gynecologists and internists say some patients have stopped taking hormones, only to resume their use when they find symptoms intolerable. Others say most women who

stop taking the pills have little or no trouble. They note that even before the study was halted last summer, more than half of the women who started hormone therapy stopped it on their own within a few years.

Still other doctors are devising their own methods of weaning women from the drugs—suggesting they wear estrogen patches and gradually trim them down to nothing, or increase the interval between pills. In this, however, they are acting on their own. There are no practice guidelines, no rigorous studies on what works best.

Eventually, the Women's Health Initiative will have data on how its participants fared when they were advised to stop taking their hormone pills. For now, the only data come from drug company sales figures, which show that many women taking Prempro, the hormone combination made by Wyeth that was tested In the study, have stopped, their number falling to 1.5 million from 2.7 million.

But in Wyeth's loss, other companies see an opportunity. For example, sales of Evista, made by Eli Lilly & Company, rose by 24 percent in September. Evista, which can actually elicit hot flashes but protects bone, has some estrogenlike properties, but the company emphasizes that it is not a hormone.

"There's this whole open market" said Valerie Layne, a nurse practitioner at Hightstown Medical Associates, a private practice in New Jersey where she says the Eli Lilly sales representative is now a frequent visitor. "They know our alternative now is their drug," Ms. Layne said. "Even though honnone therapy may be O.K., everyone is too afraid to continue."

The Burst Bubble

The study that caused this uproar, the Women's Health Initiative, involved 16,000 women who were randomly

assigned to take either Prempro, a popular combination of estrogens and progestin, or a placebo. The researchers halted the study prematurely when the accumulating data indicated that even though hormone therapy can reduce cholesterol levels, women who took Prempro had slightly more heart attacks, strokes and blood clots. They also had slightly more breast cancer. These risks exceeded the regimen's benefits, of slightly less colon cancer and slightly fewer fractures.

Women who were taking Prempro were advised to stop taking the pills immediately, and the scientists said there was no reason to believe that the findings applied only to Prempro. Until proven otherwise, they said, women and their doctors should assume that all hormone therapy that involved estrogen and progestin bears the same risks.

The study did not test other hormone regimens, but many researchers say it cannot be assumed that they are any safer.

At first, many doctors, gynecologists in particular, reacted with anger and denial.

"We have had a real love affair with hormone therapy," said Dr. Susan L Hendrix, a study investigator and gynecologist at Wayne State University in Detroit. When the study said it might not be a panacea, "it was like telling someone they have an ugly baby."

Dr. Isaac Schiff, who is the chairman of obstetrics and gynecology at Massachusetts General Hospital in Boston, said it was his impression that many gynecologists were upset because their own clinical experience had told them that the drugs were a boon to women. Internists, he added, who had been prescribing hormone therapy to prevent conditions like heart disease and osteoporosis, tended to be more accepting of the study's findings.

Dr. Schiff explained: "As a gynecologist, you have a patient who comes into your office who is troubled with hot

flashes or she has severe vaginal atrophy and she says sex is not pleasurable. You prescribe hormone therapy and she comes back four months later and says, 'Oh, doctor, I feel so much better.' An internist does not have someone come back and say, 'Thank you, doctor, my heart feels better.'"

Yet many gynecologists, even those who say they think hormone therapy has been demonized, say they have changed their message.

"In the old days, I used to say, 'Look, there's no evidence that this in going to hurt you,'" said Dr. Andrew Good, a gynecologist at the Cleveland Clinic. "Now I can't say that with the same enthusiasm."

Dr. Jan L Herr, a gynecologist at Kaiser Permanente Medical Group in San Rafael, Calif., said the new message has meant that women have had to change their expectations of life in their middle years. She asks women who find their symptoms of menopause unbearable to try the lowest possible dose of hormone therapy, which may not rid them of their symptoms.

"They have to be satisfied with feeling better, but not perfect," Dr. Herr said. "They had always wanted to feel perfect," with no hot flashes, no night sweats, no vaginal dryness. "They had always said, Why should I feel like I'm 55? I want to feel like I'm 30.'" Now, she said, women have to get used to feeling as if they are 55.

'Honey, It's the Hormones'

Iretta Taylor, a customer service adviser in Houston, said she tried to live without hormone therapy but decided she would rather not.

Ms. Taylor, 49, explained: "I went into menopause at a very early age, at about 40, and it was a very bad, very emotional time. I was edgy, depressed, I thought I was having a nervous breakdown. I had hot flashes, too, and a hollow, dry look, and dryness in the vaginal area, which was no fun.

"As soon as I started taking H.R.T, it all went away," she said, referring to hormone therapy by its old name, H.R.T., for hormone replacement therapy. "A co-worker told me, 'Your skin looks so fine.' It did; I had a real glow.

"When I heard all the horror stories last summer I stopped," She said. "I didn't even call my doctor; I just stopped. Right away I started to feel bad again. I thought at first that it was psychosomatic, but then I realized, 'Honey, it's the hormones.'

"I asked my doctor, 'Please put me back on H.R.T.,' and he did." Now, she said: "I feel like a woman is supposed to feel. If they ban this in the United States, I'll drive down to Mexico to get it. That's how much I need my H.R.T.

The question is, Are women like Ms. Taylor the exception or the rule?

"It's very clear that there is some proportion of women who did not react well to cold turkey," said Dr. Marcia L. Stefanick of Stanford University, who as principal investigator for the Women's Health Initiative lectures about the study and its results. "They are very vocal. But then I ask the audience, How many of you went cold turkey and had no problem whatsoever?" She is finding that "the vast majority of women are doing fine."

Dr. Herr turns to data from the days when she and others urged all women to take hormones. After two years, she said, 80 percent were not taking the drugs—they simply stopped filling their prescriptions. That tells her, she said, that many women are not bothered by severe symptoms, or choose to live with them. Doctors, she added, are more likely to hear from the women about their difficulties, which can skew their perspective.

They may not see women like Elizabeth Benney, who is 69 and runs a horse farm in Upton, Mass. She never had a hot

flash, never had a night sweat, but started taking hormones about 15 years ago to alleviate vaginal dryness and avert osteoporosis, worried because her mother had had the disease. She feared that if her bones thinned and she was thrown from a horse, they might fracture.

Last July, "when the news came out," she said, "I decided to stop." She did so with some reluctance, worried that the vaginal dryness would return and that her skin might age without the hormones. To her surprise, nothing happened. She feels and looks fine—no different, she says, from when she was taking the pills. Her bone density is fine, she added, so she does not appear to be at risk for fractures.

Doctors say some women are remaining on estrogen because they believe it keeps their skin looking young. The studies, so far, "are not nearly as well done as one would like," said Dr. Barbara A. Gilchrest, chairman of the dermatology department at Boston University School of Medicine. But, Dr. Gilchrest said, there is credible evidence that hormone therapy can thicken skin by increasing the amount of collagen, or prevent its loss. It is not clear when questions about these or other possible uses of hormone thereapy will be answered. Some studies, like ones asking if the therapy protects against Alzheimer's disease, are continuing. But given the findings so far, there is some question whether it would be ethical to conduct studies of cosmetic uses. Many women, however, are already convinced.

"You wouldn't believe how many women want to stay on estrogen for their skin," said D. Margaret M. Polaneczky, a gynecologist at the Iris Cantor Women's Health Center in New York. "You could have an hourlong intellectual discussion about all the risks and benefits of hormone replacement therapy, about how it might be better to consider some other drugs for, say osteoporosis prevention, and you think you've both agreed. But just as you're getting ready to

write a prescription for Fosomax, she'll say, "Wait a minute—I've changed my mind, I think the estrogen is making my skin look younger, I'm going to stay on it.'"

Some can wean themselves from hormones only gradually, using schemes their doctors invented. Some doctors ask women to try doing without hormones on weekends, gradually extending the hormone-free days into the week. Others advise taking a pill every other day for a few weeks, then every third day, gradually going down to no pills at all. Dr. Hendrix prescribes hormone patches and tells women to cut them each week, snipping them down until there is nothing left.

"Is there any science to this?" Dr. Hendrix asked, "absolutely not. We're on a rapid learning curve."

The Alzhelmer's Hypothesis

Dr. Rowan T. Chlebowski of the Harbor U.C.L.A. Research and Education Institute, an investigator with the Women's Health Initiative, has been spending time talking to doctors about what the study's data mean, and how to go on from here. His experience, he says, is a window on the lingering confusion. While the initial message is clear—that women should be asking themselves why they are taking hormones rather than why they are not taking them—it is overlaid with all sorts of what if's.

What if a woman takes hormones for only a year or so and then stops? The answer is, no one knows, Dr. Chlebowski said. "It is almost certain your risk will be reduced, but then it's a question of, well, what is the risk compared to the benefits?"

What if, doctors ask, they sit down with a woman and figure out what her risks are? They could suggest to women at risk of breast cancer or heart disease that they try to do without hormone therapy and advise that women at risk for colon cancer or osteoporosis take it.

If only it were so simple, Dr. Chlebowski said. One problem, he said, is that there is no reliable way to determine which women are at particular risk for specific diseases, whether it is breast cancer, heart disease, osteoporosis or colon cancer.

"There's a kind of assumption that a doctor can chat with you about your risk—Did your mother have a heart attack?—and that that would have an influence on what you're doing." The problem, he said, is that "our current methods don't do very well" in predicting risk.

Some doctors also wonder if there might be critical periods when estrogen might protect against heart disease, osteoporosis or Alzheimer's.

While there are drugs to protect against heart disease and osteoporosis, there is nothing yet to prevent Alzheimer's. So if the window-of-opportunity hypothesis has any urgency, it might be with that disease.

"I think it is the most compelling reason to take estrogen," said Dr. Stanley Birge, a gerontologist at Washington University in St. Louis.

But other experts say that at this point it is simply wishful thinking to say that estrogen therapy is protective, but only if it is started early. Nevertheless, some women say that for now they will accept hormone therapy's small excess risk in hopes that by starting therapy early they will gain a potentially large benefit.

The Alzheimer's hypothesis "is a supposition," said Dr. Deborah Grady, who directs the University of California San Francisco/Mount Zion Women's Health Clinical Research Center.

While some laboratory and animal studies have indicated that hormone therapy might protect brain cells, it is not clear what would be required to prevent Alzheimer's. In some

studies, like one published last week, women who were taking hormones had less Alzheimer's disease, but in others they did. Dr. Grady said that in several studies, women who took estrogen actually preformed worse on cognitive tests. But Dr. Stefanick said that until researchers completed rigorous studies asking if estrogen can protect against Alzheimer's disease, the question will linger.

THE WALL STREET JOURNAL

Friday, October 25, 2002

HRT WORRIES GIVE HEADACHES TO DRUG MAKERS

By Vanessa Fuhrmans

IN JUST FOUR MONTHS, hormone-replacement therapy has turned from a growing business into a major headache for many drug makers.

Consider Schering AG. Just a few months ago, the German company, which had been a key player in pioneering the birth-control pill 40 years ago, had two new treatments for menopausal symptoms on course to be approved in the U.S. next year. And it was forging ahead in more experimental hormone markets, having recently acquired rights to a testosterone therapy for men.

But in July, the Women's Health Initiative, an ongoing federally funded study, announced a possible link between a popular hormone pill and heightened risk for breast cancer, heart attacks and stroke. The international storm that followed has buffeted Schering's stock price, and the company has lost more than a quarter of its market value.

In the past two weeks, the Food and Drug Administration has rejected two menopause treatments from Schering awaiting approval, setbacks that could force Schering (which isn't related to Schering-Plough Corp. of the U.S.) to conduct new studies.

"I don't want to play it down," says Schering Chief Executive Hubertus Erien. "It was a real surprise and a real disappointment."

The Women's Health Initiative study looked only at the most popular hormone replacement, Wyeth's Prempro, a drug once taken by as many as six million women. But news of possible health risks have raised questions about safety of a whole range hormone-replacement drugs. Some researchers warn that it isn't possible to rule out risks associated with short-term HRT.

This week, the U.S. Preventive Services Task Force, a medical panel that helps set federal government policy. recommended against the routine use of estrogen and progestin for the prevention of chronic post-menopausal symptoms, such as osteoporosis.

Yesterday, at a conference sponsored by the National Institutes of Health on hormone-replacement therapy, Wyeth executives called on regulators and health experts to clarify what the study's findings really mean for women in need of treatment for acute menopausal symptoms, such as hot flashes, night sweats and vaginal dryness. The company also presented data that it says show the hormone therapy's benefits outweigh the risks when it used as a short-term treatment.

"More than 85% of women who start hormone therapy seek relief from menopausal symptoms," says Victoria Kusiak, vice president of medical affairs for Wyeth. "They need to know what the results of WHI mean for them."

Other companies also have been affected by questions about health risks of hormone replacement therapy. Prescription orders for Prempro have fallen nearly 50% since July, according to NDC-Health, a health-care information-services company. Orders for Wyeth's estrogen pill, Premarin have tumbled 18%.

Many women have stopped filling prescriptions for other products too: Orders for Pfizer Inc.'s FemHRT have dropped by 13%, Solvay Pharmaceuticals' Estratest by 16% and Galen Holdings PLC's Estrace by 15%.

"Right now, everything is getting painted with the same broad brush stroke," says David Archer, professor of obstetrics and gynecology at Eastern Virginia Medical School in Norfolk, Va. Pfizer says its sales representatives have been pointing out to doctors that FemHRT wasn't used in the WHI study. Officials at Galen and Solvay couldn't be reached.

FDA also is taking a more-cautious approach to hormone-based treatments. At conference yesterday, FDA officials told drug and health-care industry officials that the WHI study would have implications for how new estrogen drugs are developed and tested.

Schering, a big player in women's health products, remains small in hormone-replacement treatments, deriving just 7% of its global sales from them. Angeliq, the Schering hormone-replacement pill that the FDA rejected last week, wasn't expected to be nearly as popular as Prempro in the U.S. market for menopausal treatments (Regulatory authorities in Europe are still reviewing it.)

Schering's popular birth-control pill, Yasmin, is based on the same kind of progestin as the one used in Angeliq. Worries that health risks could taint Yasmin have recently weighed down Schering's shares, which yesterday were trading about 30% below their 52-week high, reached June 28.

Schering won't say why the FDA withheld approval for Angeliq. But Werner-Karl Raff, head of Schering's fertility and hormone-therapy businesses, says, "It is understandable that it is difficult to assess new HRT preparations," in the new debate over such treatments. Schering says it will begin new talks with the FDA over how to address its concerns about the

hormone-replacement pill. The FDA refuses to discuss, or even acknowledge, decisions to reject new-drug applications.

Schering's Dr. Erien says despite the doubts now swirling around the safety of many hormone treatments, he is convinced hormone-replacement therapy remains a viable business, even for small players such as Schering. "Our strategy is unchanged," he says. "We want to have a greater share of that market."

Schering currently has just one hormone-replacement product on the U.S. market: Climara, an estrogen patch. This month, the FDA rejected a new version, Climara Pro, that also includes progestin, citing questions about the documentation of one of the main studies of the drug. prescriptions for Climara, with U.S. sales of $83 million, have fallen by roughly 14% in the U.S. since July.

In sales calls to doctors, Schering is stressing that its hormone products use plant-based molecules, in contrast to Wyeth's Prempro, which is derived from the urine of pregnant mares. Because HRT products made from nonanimal sources metabolize in the body differently, it's possible they contain less risk. But there aren't any studies to back up this theory.

THE STAR-LEDGER

THURSDAY, DECEMBER 12, 2002

LAWMAKERS BLAST ROCHE, FDA ABOUT ACCUTANE

By Jonathan Casiano
Star-Ledger Washington Bureau

WASHINGTON—The Food and Drug Administration and a New Jersey drug maker were sharply criticized by members of Congress yesterday for failing to tightly regulate use of the acne drug Accutane.

The medicine, produced by drug maker Hoffmann-La Roche, is known to cause birth defects and has been blamed for teenage suicides.

"The FDA's response to the birth defects and psychiatric events has been inadequate, irresponsible and unacceptable," Rep. Bart Stupak (D-Mich.) said during a hearing before the House Energy and Commerce subcommittee. "The drug manufacturer, Hoffmann-La Roche, has continued to put profits before people."

Stupak, who blames Accutane for his 17-year-old son's suicide in 2000, has led the fight against the hugely popular drug, prescribed to an average of 600,000 people each year.

Roche President and Chief Executive George Abercrombie told the congressional panel fewer prescriptions and sagging sales are evidence patients are increasingly aware of Accutane's risks.

"We have acted in a responsible manner by adopting precautionary measures to communicate psychiatric information to prescribers and patients," Abercrombie testified.

But Stupak was joined by other lawmakers expressing concern about misuse of the powerful medication.

"This drug is perhaps more dangerous to pregnant women than Thalidomide, yet women are still getting pregnant while taking it," said Rep. Peter Deutsh (D-Fla.), comparing Accutane with the notorious 1960s morning sickness pill that caused birth defects. "It's a tragedy."

Stupak claimed Accutane was the cause of more than 200 teen suicides—a figure disputed by Roche, which has its U.S. headquarters in Nutley—and at least 172 birth defects.

Along with Deutsh and other lawmakers, he called for new controls, including creation of a mandatory FDA registry that would require every patient taking Accutane and every doctor prescribing it to enter a national database so the side effects could be monitored.

Currently, participation in a pregnancy prevention and monitoring program for Accutane is voluntary. The program includes two pregnancy tests, a commitment to use contraception while on the drug, a signed letter of consent and follow-up surveys to monitor side effects. Only 43 percent of female users are fully participating in the program.

FDA officials defended their regulation of Accutane, arguing that clear warnings of possible birth defects and psychological side effects appear prominently on the front of Accutane packaging.

They also pointed out that scientific studies have yet to link Accutane to depression, suicidal thoughts or suicide.

"All the evidence (on suicides) is anecdotal," said Janet Woodcock, director of the FDA's Center for Drug Evaluation and Research. "There is no scientific link to take this drug off the market."

Abercrombie, the Roche CEO, said his company has curtailed its aggressive advertising campaign for the drug and

distributed an extensive battery of literature for patients and doctors.

He added that Accutane is one of the few medications for any disease that requires signed consent by the patient before being prescribed.

Accutane, the brand name for isotretinonin, is the only proven treatment for very severe cases of acne, prompting many dermatologists to enthusiastically recommend it despite its side effects.

Since its inception in 1982, the drug has treated more than 13 million people and last year earned $750 million for Roche, making it one of the drug maker's top products.

During the hearing, the subcommittee also heard from patients who benefited from Accutane and from Cornell dermatologist Diane Berson, who called it a "life-changing" medicine.

"Accutane is an extremely valuable drug which I feel must remain available for dermatologists to prescribe to those patients who clearly need it," Berson said.

THE WALL STREET JOURNAL

THURSDAY, NOVEMBER 21, 2002

Tackling a Killer

Vaccine to Prevent Cervical Cancer Shows Promise

In Interim Test, Merck Product Blocks Key Forms of Virus That Can Lead to Tumors

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Unusual Marketing Challenges

By Gardiner Harris

Cervical cancer kills almost as many women world-wide as breast cancer. *A* vaccine under development has the potential to cut the toll steeply.

The vaccine is still in testing and wouldn't available until 2006. But a just-published study gives an indication of its power and the developer, Merck & Co., is already wrestling with tricky marketing questions the vaccine would present. They arise because for the vaccine to be most useful, politicians, bill-payers and the parents of millions of adolescent children would all need to sign on.

Most cervical cancer is caused by sexually transmitted strains of human papilloma virus, or HPV. This is an extremely common family of viruses that also causes warts on hands, feet and genitalia, in both sexes. Just two strains of HPV are believed responsible for 70% of cervical cancer. Merck's vaccine might prevent infection from those two strains.

In the study published today, about 2,400 women aged 16 to 23 who had had five or fewer sexual partners received a version of the vaccine, while others got a placebo. Seventeen

months later, 41 women who received placebos had become infected with a strain of HPV that can lead to cervical cancer. None of those who got the vaccine were infected. An accompanying editorial in the New England Journal of Medicine, which published the Merck study, said it demonstrated that "cervical HPV infection—and, by association, cervical cancer—can be prevented by vaccination."

The study was an interim one. Merck is now doing a final "Phase III" study that, if it proves both effectiveness and safety, could lead to marketing approval. Food and Drug Administration officials have told the company they want to know not only whether the vaccine blocks viral infection but also if it prevents precancerous lesions on the cervix, the kind detected by Pap tests. Meanwhile, two other groups, including the National Cancer Institute, are developing competing vaccines.

Cervical cancer kills at least 4,000 U.S. women annually and about 230,000 world-wide. The vaccines won't end the disease, not only because many women already are infected with a form of HPV that can cause cancer but also because vaccine distribution is apt to be spotty in developing countries. More than 80% of the 470,000 annual cases of cervical cancer occur in those countries. Once an HPV infection takes hold, any resulting cancer can be treated, but the viral infection itself can't be eliminated.

"Is this the end? It is not," says Martin Kast, a researcher at Loyola University in Chicago. Dr. Kast leads one of nearly 20 groups across the world that are working to create an HPV vaccine that would help those who already have cancer. Such a vaccine is many years away, Dr. Kast says.

To be most effective, an HPV vaccine would have to be given to girls before they had been exposed to the virus through sex. Thus, from a marketing perspective, the vaccine's maker could face a delicate task in persuading

parents to vaccinate their young daughters against a virus that they wouldn't be subject to until they became sexually active.

Although boys obviously aren't subject to cervical cancer, a vaccine would have greater impact if it were also given to boys, since they do get HPV and can pass it along. Most boys infected with HPV have no symptoms at all, not even genital warts. Hence another marketing challenge: Merck is concerned that it might not be easy to persuade parents to have their 10- or 12-year-old sons vaccinated.

Potential Hurdle

Even politics could pose a hurdle, some within Merck believe. Assuming marketing approval, the company would hope to get the U.S. government to pay for the vaccine as part of an existing program that now pays for half of childhood vaccines. But marketers are concerned that some conservative politicians might challenge the use of tax dollars for a vaccine that would essentially make sex safer.

HPV infection by no means dooms a woman to develop cervical cancer. It's estimated that less than 1% of women who become infected with the cancer-causing forms of the virus develop cervical cancer or a worrisome condition called "severe dysplasia." Years or decades may pass between infection and disease.

Infection is very common. One study of female students at Rutgers University in New Jersey found that 26% were already infected with HPV when they arrived as freshmen. The rate was 60% after three years of college.

Other studies have indicated that women have a 20% chance of getting an HPV infection with their first intercourse. Condoms help prevent transmission but aren't a guarantee. The virus can also be passed by simple touching.

Merck has a track record of successfully running "educational" marketing programs that boost awareness of medi-

cal problems, such as high cholesterol and osteoporosis, and then promote a Merck product as the solution. But the many questions surrounding the distribution and use of an HPV vaccine initially led some Merck executives to debate whether investing in the project made economic sense.

Having gone ahead and shown great progress, Merck now is gearing up its enormous marketing muscle to promote the HPV vaccine as a life-saver. Its thousands of salespeople would first visit pediatricians, OB-GYNs and family-practice doctors to convince them of the vaccine's importance. Then the company might begin a large advertising campaign. It would aim to see the vaccine used not only in young people, both girls and boys, but also in mature, sexually active women.

Its usefulness in such women would be less clear. Researchers have focused on four common strains of sexually transmitted HPV. Only two can lead to cervical cancer. If a woman was already infected with both, the vaccine might not help—it doesn't kill the virus. If she was infected with one of the two, vaccination could still help lower her odds of getting cancer.

Merck is formulating the vaccine to block all four of these HPV strains, partly as a way to make vaccination easier to sell to parents of young boys. Merck has indications the vaccine might be 90% effective in preventing genital warts when given to people not yet exposed.

Merck's marketing plans concern one top researcher at the National Cancer Institute. John Schiller, a senior investigator there, frets that if Merck over-sold the benefits, some women might become less vigilant about getting Pap tests, leading to missed opportunities for diagnosis. "If companies are driving the public-relations campaign, it may be difficult to point out that this vaccine is only 70% protective against cancer," Dr. Schiller says.

Working Feverishly

Merck has been working feverishly on its vaccine since 1993, two years after a researcher in Australia figured out how to construct tiny shells of the virus that would fool the body into attacking the virus. By then, teams from the National Cancer Institute and MedImmune Inc., a Maryland biotechnology company, were already working to develop HPV vaccines.

The study published today shows Merck has leapfrogged both competitors. Dr. Schiller estimates that Merck is at least a year ahead of his effort and that of MedImmune. GlaxoSmithKline PLC, which licensed the MedImmune program, declines to comment except to say its vaccine is in Phase II trials, which gauge dosage and give some indication of effectiveness. Though the study published today was also a Phase II study, Merck is now well along in the final Phase III efficacy test needed for marketing approval.

Researchers observed more than 100 years ago that prostitutes had very high rates of cervical cancer, leading to speculation that a sexually transmitted virus caused it. In the mid-1970s, a German researcher isolated HPV in cancerous tissue.

Merck had no plan to use the HPV virus itself in a vaccine. Not only can even a killed virus occasionally prove dangerous, but this virus is all but impossible to grow in a test tube. Researchers have found that the shell of a virus will do just as well in gearing up the immune system for a fight.

A researcher named Kathrin Jansen began Merck's program in early 1993, surreptitiously working on HPV because she was discouraged with her other work. "It really got started under the radar," she says. She asked a Merck yeast expert, Loren Schultz, if he could coax yeast into making HPV shells.

The decision to use yeast would prove crucial. MedImmune and the NCI both used host cells derived from butterfly caterpillars. While those were easier to use in small quantities, they are very hard to use in large-scale manufacturing.

The two scientists picked apart the genetic code of HPV-11, a strain that commonly causes genital warts. Using the Australian work as a guide, they figured out that a particular sequence of the code created the virus's protein shell. They stuck that sequence onto the genetic code of baker's yeast, added sugar and waited.

Nothing happened. "We might have gotten discouraged at that point if we hadn't had a lot of experience with yeast," said Dr. Schultz.

But Merck has a library of many strains of baker's yeast, developed over decades and used by the company to make a hepatitis-B vaccine. Dr. Schultz knew that yeast strains all behave differently. The huge yeast library would prove a boon to Merck's effort.

Dr. Jansen also needed to choose what forms of HPV to tackle. There are nearly 100 strains in all, a third of which can be sexually transmitted. Researchers had discovered that HPV-16 and HPV-18 were the most common causes of cervical cancer. Two others, HPV-6 and HPV-1I, were thought to cause most genital warts.

Dr. Schultz now struggled to coax his yeast into growing the shells of all four strains—hitting a brick wall with one strain. Meanwhile, Dr. Jansen wanted to do a quickie test to see if an HPV vaccine could work, so she tried vaccinating cottontail rabbits against an HPV-like wart. The rabbits didn't get warts.

It was time to decide whether to start tests in humans—a hugely expensive undertaking. She brought her results to

Edward Scolnick, Merck's chief of research. He figured the science made sense and Dr. Jansen had the grit to get the project done, so he approved spending the money.

Now Merck's yeast experts had to figure out a way to grow huge quantities of HPV shells. That proved another big technical hurdle, which another Merck yeast expert, Hugh George, finally solved. Even when he did, shells for three of the four HPV strains came out mangled, "like goofed-up balls" instead of geometric gems, as one researcher put it. Only when they applied salt and acid did the balls, made up of 72 different proteins, reorganize themselves into the proper shape.

Merck believes its vaccine can not only block cervical cancer but also prevent genital warts in boys. But it hasn't yet figured out how to prove this, because of the difficulty of collecting tissue samples. For girls, a Pap test is enough. In boys, Merck found it has to use something akin to a nail file to get enough skin cells for a proper lab sample. "We had a team meeting and I asked everybody how we could get good samples from men, and the room cleared out pretty quickly, " says Dr. Jansen. "I gave my husband some tools. He never could get a good sample, and he wouldn't let me try."

THE WALL STREET JOURNAL

WEDNESDAY, NOVEMBER 20, 2002

Stents May Become Useful Tool In the Prevention of Strokes

Procedure That Catches Loosened Plaque Is Crucial To the Carotid Treatment

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By RON WINSLOW

CHICAGO—Stents, the tiny metal devices that have transformed treatment of heart patients, could become an important tool in preventing strokes, a new study suggests. But the study points up the importance of using tiny filterlike devices in conjunction with the stents in stroke prevention.

Currently, about 200,000 patients a year undergo a surgical procedure on neck arteries called carotid endarterectomy. The procedure aims to avert a potential stroke by clearing out obstructions in the artery that transports blood to the brain. But the operation itself comes with significant risk of complications, and researchers have been seeking safer and more effective ways to remove the blockages.

In the new study, headed by Jay S. Yadav, of the Cleveland Clinic, 307 patients with severe blockage in their carotid arteries were randomly assigned to getting the experimental stent procedure or the operation. The patients had additional health problems that significantly increased their risk of complications from either procedure.

Importantly, the stent, a wire-mesh scaffold that resembles a ballpoint pen spring, was combined with a small, umbrella-like filter device that doctors deployed downstream of the blockage to capture any debris that became dislodged during the placement of the stent.

In both the surgical and stent procedures, the effort to treat the artery can cause small particles of disease-causing plaque to break off and get carried with the blood into the brain where they can cause strokes and other problems.

The study found that after 30 days, nine, or 5.8% of the 156 patients assigned to the stent and filter device either died or suffered a heart attack or stroke. That compared with 19, or 13%, of the 151 patients who had the surgery, a relative reduction of 54%.

Dr. Yadav presented the results at the annual scientific meeting of the American Heart Association here. Johnson & Johnson's Cordis unit, which markets a variety of stents and is developing a filter called Angioguard, sponsored the study. Angioguard isn't yet on the market. Several other companies, including Guidant Corp. are developing similar devices for use in the carotid arteries.

In the experimental procedure, the filter is deployed first, threaded into the carotid artery in a closed position past the blockage and then opened. Subsequent placement of the stent often causes a "cheese-grater" effect that can dislodge bits of the plaque. That is what the filter basket is intended to capture. "We saw visible particles in 80% of these filters," Dr. Yadav said. While that raises the possibility that a clogged filter could block or slow necessary blood flow to the brain during the procedure, Dr. Yadav said that wouldn't likely cause a major problem. Deploying the stent—the step that is most likely to lead to the debris breaking off—comes at the end of the procedure, so the doctor can quickly retrieve the basket and restore normal blood flow with little risk of adverse consequences, he said,

"The contribution of the protection device would appear to be an important part of the study," said Sidney Smith, cardiologist at University of North Carolina at Chapel Hill and chief science officer of the American Heart Association.

The results were "impressive," he added, but said both longer follow-up data from this trial and other studies of lower-risk patients are needed to determine how widely the technique might be used.

Dr. Yadav described the 30-day findings as preliminary and said the plan is to follow patients for one year. The type of high-risk patients included in the study account for about one-third of those who undergo carotid endarterectomy each year. Other studies, including one sponsored by Guidant, are exploring whether carotid stenting will prove beneficial for lower-risk patients.

(20)

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

No. 02-575

In the Supreme Court of the United States

OCTOBER TERM, 2002

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of California

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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February 28, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

28 pp

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of more than three million businesses of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business.[1]

The Chamber and its members have a strong interest in this case because the California Supreme Court significantly curtailed the freedom of speech by holding that most speech by businesses is "commercial speech" subject to reduced First Amendment protection. Just as petitioner Nike, Inc., discussed its overseas labor practices in the statements at issue in this case, so too do other businesses frequently discuss various aspects of their own operations in the course of ongoing public policy debates. Indeed, those topics about which individual businesses are best informed and have the most to contribute to the public debate are often precisely the subjects for discussion that would be curtailed by the ruling below.

Under the California Supreme Court's decision, all such speech on topics of public concern could be subjected to the reduced First Amendment protection accorded "commercial speech," and corporations could be held strictly liable for any factual misstatements mistakenly made in the course of public policy debates. The effect of the ruling below is thus

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

to suppress corporations' speech and discriminate against them by holding that speech by corporations on important public policy matters is subject to the reduced protection accorded "commercial speech," but speech by their opponents is not. And this disparate and unfair treatment is not limited to speech in California. Because corporations' speech is increasingly disseminated on a nationwide and even worldwide basis, the decision below would threaten not only speech in California, but also speech elsewhere across the globe. Therefore, the Chamber urges reversal of the California Supreme Court's decision.

SUMMARY OF ARGUMENT

For many years, the Court has sent conflicting signals on the definition of "commercial speech" and has allowed the lower courts to take divergent approaches on this issue. In this case, the California Supreme Court used that latitude to create yet another test for determining whether speech is "commercial," one that is both breathtakingly broad and deeply menacing to our system of free expression. According to that court, "commercial speech" includes all statements of fact: (i) by persons engaged in commerce (including all businesses); (ii) to an audience including actual or potential purchasers of their products (which, in the case of a company like Nike, include almost all Americans); (iii) on commercial matters (which include nearly all matters on which corporations have any reason to speak). *See* Pet. 17a-20a.

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine was designed to *broaden* the First Amendment's reach by granting limited protection to product advertisements that were previously held to be entirely unprotected. In sharp contrast, the California Supreme Court has now employed the "commercial speech" doctrine to *restrict* the First Amendment's protections by subjecting speech at the core of the First Amendment — including speech on important public policy matters such as globalization, environmentalism, escalating health care costs, and so on — to the reduced level of protection accorded "commercial" speech. This makes no sense. As this Court explained long ago, speech about business operations and labor conditions is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

The California court's analysis points powerfully to the need to clarify the definition of "commercial speech." In particular, the Court has often stated that this doctrine properly addresses only the advertising of products and services for sale, rather than all speech by corporations. The Court should clearly reaffirm this approach. Otherwise, speech that lies at the core of the First Amendment would be relegated to its periphery. If general discussion about a company's business operations and labor conditions were subjected to the same kind of restrictions that apply to speech proposing a commercial transaction, the predictable result would be to impede and impoverish public debate on important policy issues.

This Court's authoritative guidance on the definition of "commercial speech" is much needed by the entire business community. As matters stand, this longstanding uncertainty regarding the definition and treatment of commercial speech, exacerbated by the California Supreme Court's decision, threatens to chill speech on important public policy matters. That should not be. Moreover, the increasingly nationwide and even worldwide scope of corporate speech means that corporations are effectively bound by the law that applies in the least protective jurisdiction. As a result, this Court can no longer afford to defer this issue yet again and should take this opportunity to clarify that restrictions on commercial speech are inapplicable to corporate speech on matters of public concern.

ARGUMENT

I. AFFIRMANCE OF THE RULING BELOW WOULD RESULT IN THE IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY ISSUES.

A. The Court's Precedents Have Generated Substantial Uncertainty And Confusion Regarding The Definition Of "Commercial Speech."

In its prior commercial speech cases, the Court has set out at least three different tests for determining whether speech is in fact "commercial." The Court has "usually defined" commercial speech as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *accord Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). At times, however, the Court has applied a more expansive test, under which "expression related solely to the economic interests of the speaker and its audience" is treated as "commercial." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). And the Court has articulated yet another test, which considers three factors: whether the communication was an advertisement, whether it referred to a specific product or service, and whether the speaker had an economic motivation for the speech. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). Puzzlingly, under this last test, speech is not necessarily commercial even if all three factors are met, and speech can be commercial even if all three factors are not met. *See id.* at 67 & n.14.

The Court itself has acknowledged the inconsistency and indeterminacy of these and other precedents in this area. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993). The Court, however, has thus far

chosen not to resolve this inconsistency or to give clearer guidance on these points. *See, e.g., United Foods*, 533 U.S. at 410; *Discovery Network*, 507 U.S. at 416.

As commentators have noted, this Court's "attempts to define 'commercial' speech" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 831-32 (1999); *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 5 (2000) (noting that the "boundaries" of the commercial speech doctrine are "quite blurred"). In light of this continuing uncertainty, lower courts have either adopted one of the various tests set out by this Court, or simply formulated one of their own.

In this case, the California Supreme Court took the latter approach and held that "commercial speech" includes all statements of fact: (i) by persons engaged in commerce; (ii) to an audience including actual or potential purchasers of their products; (iii) on commercial matters. *See* Pet. 17a-20a.[2] Although the California Supreme Court represented that this test was consistent with this Court's "commercial speech" jurisprudence, the test bears only the most superficial relationship to the *Central Hudson* definition of commercial speech as "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. It thus well illustrates the Seventh Circuit's concern about "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998). The test adopted below also seems to

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[2] Remarkably, the California Supreme Court suggested that its novel test applies only for some purposes, and that some other unspecified test might apply in other cases. *See* Pet. 17a. It thus not only added a new "commercial speech" test to the jurisprudential mix, but signaled the future proliferation of even more tests.

draw on the broad discussion in *Bolger* of situations in which the speaker has an "economic motivation" for engaging in speech that relates in some more general way to its products and services. *See* 463 U.S. at 66-68. Indeed, the court below justified its broad formulation of the test for commercial speech by concluding that all discussion and debate about the business operations of a particular corporation constitute "product references" for purposes of the *Bolger* test. *See* Pet. 13a-15a, 18a-19a.

The California Supreme Court clearly recognized that the confusing and contradictory nature of this Court's case law provided it with the opportunity to venture out on its own and craft an entirely new definition of "commercial speech." It expressly quoted this Court's prior statements about "the difficulty of drawing bright lines" in dealing with commercial speech, Pet. 15a (quoting *Discovery Network*, 507 U.S. at 419), and that "the precise bounds of the category of" commercial speech are "subject to doubt," *id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)). As this case amply illustrates, the current muddled state of the law is emboldening lower courts to strike out on their own and fashion improperly broad definitions of what constitutes "commercial speech."

B. The Test For Commercial Speech Devised By The California Supreme Court Is Extreme, Unworkable, And Unprecedented.

Not only is the California Supreme Court's definition of "commercial speech" inconsistent with this Court's prior definitions, it also is inconsistent with this Court's First Amendment jurisprudence more generally. In particular, the ruling below denies full constitutional protection to virtually *all* speech by corporations on matters involving their business operations or labor conditions. Even where such speech touches on matters of acknowledged public concern, and even where it is tinged with direct political or legislative overtones, it will be entitled only to lesser protection.

If the California Supreme Court's decision is allowed to stand, the consequent vacuum that will occur in public discourse is undeniable. Matters relating to corporations' business operations and labor conditions constitute nearly all matters on which corporations have reason to speak. They also include the very matters on which corporate speakers are the best informed and thus best able to contribute to a meaningful discussion on issues of public concern. In this instance, Nike spoke generally about its business operations overseas, in the context of an ongoing public policy debate, without ever mentioning any of its products or services, much less offering any prices or terms of sale. *See* Pet. 3a-4a. Denuding the public square of corporations' involvement in robust debate would disserve the public by preventing a fair and complete treatment of most business issues.

Moreover, the California Supreme Court's test for commercial speech is seemingly not limited to speech by corporations. Indeed, any individual engaged in commerce who attempts to speak on commercial matters to an audience that includes actual or potential customers would be swept within its broad ambit. *See id.* at 17a-20a. Thus, lawyers who engage in an informative debate before a local business group on the topic of tort reform would be covered if their audience included any actual or potential clients. Doctors who speak to a local civic association on their concerns about rising malpractice rates and what could be done about them would be covered if the audience included any actual or potential patients. Any or all of the participants in such a public forum could be held strictly liable for any factual misstatements in the course of their discussion.

This breathtakingly broad test is clearly out of step with long-established First Amendment principles. Decades ago, the Court squarely held that self-interested speech "concerning the conditions in industry and the causes of labor disputes," much like the speech at issue here, is not only protected by the First Amendment, but is "indispensable

to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). Other cases agree that speech relating to a corporation's business operations — especially speech relating to its labor conditions, like Nike's speech here — is fully protected. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-17 (1969); *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945); *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477-78 (1941).

In a number of other contexts, moreover, the Court has broadly emphasized the need to protect the publication of information on issues of "public concern," without excluding issues involving business operations and labor conditions. In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for example, the Court permitted the publication of information, even though it had been illegally obtained, because it concerned important collective-bargaining negotiations that were pending at the time, and "negotiations over the proper level of compensation for teachers . . . were unquestionably a matter of public concern," *id.* at 535. Similarly, in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), the Court noted that allegations of illegality in the manner in which a franchising company's principal stockholder conducted his business likewise involved matters of public concern, and comments made about them were thus subject to heightened protection under the First Amendment, *see id.* at 775-78. Finally, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court reasoned that speech by a corporation on an upcoming referendum on taxes was "at the heart of the First Amendment's protection," *id.* at 776, and therefore applied strict scrutiny to, and ultimately struck down, a state law restricting corporate expenditures for such issue advocacy in election campaigns, *see id.* at 795. Like the speech in all of those cases, the speech at issue here informs the public about matters of public concern, and therefore should be fully protected.

Other cases supporting the proposition that speech about matters of public concern is fully protected are legion. *See, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("commenting on matters of public concern" is one of the "classic forms of speech that lie at the heart of the First Amendment"); *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (First Amendment protects against termination of government contract for solid waste disposal based on "speech on a matter of public concern," including county landfill rates); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 421 (1992) (Stevens, J., concurring) ("[s]peech about public officials or matters of public concern receives greater protection than speech about other topics"); *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8-9 (1986) (plurality opinion) (utility company's discussion with its customers of topics like energy conservation implicates "'matters of public concern' that the First Amendment both fully protects and implicitly encourages"). And the Court has repeatedly held that incorrect statements on matters of public concern, no less than correct ones, are protected, on the ground that errors are inevitable in such debates. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51-52 (1988); *Hepps*, 475 U.S. at 772-73; *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).

As the Court has aptly observed, "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill*, 310 U.S. at 102. The ruling below is entirely out of harmony with this fundamental First Amendment principle. For this reason alone, the California Supreme Court's decision should be reversed.

C. The Test For Commercial Speech Applied Below Would Suppress A Broad Range Of Accepted And Beneficial Speech By Companies And Individuals.

Because the California Supreme Court significantly curtailed the freedom of speech by holding that most speech by businesses is "commercial speech" subject to reduced First Amendment protection, its holding should not be allowed to stand. Under the ruling below, speech on public policy matters such as labor, environmental, and economic issues involving a company's operations can readily be classified as mere "commercial speech." A substantial amount of protected speech is therefore jeopardized. Just as Nike discussed its overseas labor operations in the statements at issue in this case, other businesses frequently participate in the public debate by making statements about aspects of their corporate operations and corporate affairs. Indeed, this participation is often intimately connected with broader efforts to influence public policy through legislative or regulatory action. *See, e.g., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (publicity campaign conducted by railroads against truckers, which helped persuade governor to veto legislation, held not to violate antitrust laws, based in part on free speech concerns). For example:

- Energy companies, such as ChevronTexaco, express their views on whether or to what extent their operations cause or contribute to global climate change, and the role of their operations in any changes. *See, e.g.*, Statement on Global Climate Change, *at* www.chevrontexaco.com/social_responsibility/environment/global_climate.asp (last visited Feb. 27, 2003).
- Corporations involved in the United Space Alliance, which manufactured the Columbia for NASA's Shuttle program, publish updates on the investigation currently underway into the recent tragedy. *See, e.g.*, Update on Investigation, *at* www.unitedspace-alliance.com/columbia/030207-1300.htm (last visited Feb. 27, 2003).
- Health care providers and drug manufacturers, such as Merck, discuss the causes of their rising health care and drug prices, and the form of regulation or deregulation that will best control those prices. *See, e.g.*, Remarks by Raymond V. Gilmartin, Chief Executives Club of Boston, *at* www.merck.com/newsroom/executive_speeches/011900.html (Jan. 19, 2000).
- Insurance companies, such as AIG and General Re, state their positions on the feasibility of providing terrorism insurance and the economic need for legislative action. *See, e.g., Terrorism Insurance Still On Front Burner For Insurers, Lawmakers*, Ins. J., *at* www.insurancejournal.com/magazines/southcentral/2002/05/13/features/19079.htm (May 13, 2002).
- Automobile manufacturers, such as the Ford Motor Company, join the public debate over whether and to what extent automobile emissions cause pollution and health effects, and the costs and feasibility of requiring further reductions in automobile emissions. *See, e.g.*, Bill Ford's Speech to Greenpeace, *at* www.ford.com/en/ourCompany/environmentalInitiatives/environmentalActions/billFordsSpeechToGreenpeace.htm (Oct. 5, 2000).
- Manufacturers, such as General Electric, discuss the topic of environmental discharges and the effects that any discharges have had on rivers and other natural resources. *See, e.g.*, Statement on GE Hudson River Efforts, *at* www.ge.com/commitment/ehs/leadership/ehs_hudson_river.htm (last visited Feb. 27, 2003).

Under the California Supreme Court's decision, all of this speech could be subjected to the reduced First Amendment protection accorded "commercial speech," and corporations and their employees could be held strictly liable for any and all factual misstatements made in the course of heated and fast-moving debates. Such treatment marks a serious intrusion on the freedom of speech.

II. THE COURT SHOULD HOLD THAT THE "COMMERCIAL SPEECH" DOCTRINE ONLY ADDRESSES ADVERTISING OF PRODUCTS OR SERVICES OFFERED FOR SALE.

A. The History Of The "Commercial Speech" Doctrine Demonstrates That It Addresses Only The Advertising Of Products And Services, Not Speech By Corporations More Generally.

This case presents an especially useful vehicle for clearing up the widespread confusion about the definition of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech that in some way advertises the attributes of products or services for sale should be considered "commercial speech," and speech that merely relates to business operations or other matters of public concern should be accorded full First Amendment protection.

The history of the "commercial speech" doctrine strongly supports this distinction. The now-familiar doctrine was crafted to *grant* limited protection to product advertising, not to *limit* the protection already applied to other types of speech by corporations. Specifically, this Court developed the modern "commercial speech" doctrine in the 1970s in response to its earlier holding that "the Constitution imposes *no . . . restraint* on government as respects *purely commercial advertising*." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (emphasis added).

In *Virginia Board of Pharmacy*, the Court gave birth to the "commercial speech" doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." 425 U.S. at 770. In doing so, the Court could not have been clearer that by "commercial speech," it was referring only to the same kind of product advertisement at issue in *Valentine*:

> [T]he question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. *The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.*

Id. at 760-61 (emphasis added).[3] From its genesis, therefore, the "commercial speech" doctrine was designed to address speech that does *not* "editorialize on any subject," "report any particularly newsworthy fact," or "make generalized observations . . . about commercial matters." *Id.* Instead, it was designed only to provide some protection, albeit limited, to speech that does "*no more* than propose a commercial transaction." *Id.* at 762 (internal quotation omitted).

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[3] In *Valentine*, an individual circulated a handbill that advertised his commercial exhibition of a submarine. After he was told he could not distribute such material under city law, he then reprinted the handbill, adding a protest of the city's wharfage policies on the back. The Court rejected the argument that the discussion on the back of the handbill constituted protected speech, but only because it found this discussion to be an intentional "sham" included solely for the purpose of evading the ordinance. *See Valentine*, 316 U.S. at 53-55.

The Court has never departed from this understanding. To the contrary, the Court has repeatedly recognized that the advertisement of products or services, as opposed to general discussion of business operations or other matters of public concern, is the *sine qua non* of "commercial speech." Thus, in the early years after *Virginia Board of Pharmacy*, the Court made clear that "commercial speech" is speech that "serves to inform the public of the availability, nature, and prices of products and services." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (referring to "commercial speech" as "commercial price and product advertising"). More recently, too, this Court has confirmed that "'[t]he entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about *goods and services* and the right of government to regulate the sales of *such goods and services*.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quoting Laurence H. Tribe, *American Constitutional Law* § 12-15, at 903 (2d ed. 1988)) (emphasis added and omitted).

In keeping with this established understanding of the commercial speech doctrine, this Court, in sharp contrast with the approach taken by the California Supreme Court, has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). For example, while a manufacturer's speech about the attributes of a specific product is "commercial" regardless whether it is linked to a public debate, *see Bolger*, 463 U.S. at 67-68, an energy company's speech to its customers about energy conservation more generally is not, *see Pacific Gas*, 475 U.S. at 8-9 (plurality opinion). The latter speech "extends well beyond speech that proposes a business transaction . . . and includes the kind of discussion of 'matters of public concern'

that the First Amendment both fully protects and implicitly encourages." *Id.* (internal citations omitted).

B. Nike's Discussion Of Its Business Operations And Labor Practices Should Not Be Treated As "Commercial Speech."

Nike's speech in this case evidently addresses matters of public concern, and thus merits full First Amendment protection. Far from advertising the attributes of its shoes or other products, Nike was merely responding to public criticism relating to globalization — an issue that has recently been the subject of major protests worldwide, including here in the Nation's capital. Nike was not engaging in brand-name advertising containing representations about the quality or cost of its products, and indeed made no references to specific products or services at all. Accordingly, this speech is far removed from the advertising at issue in cases such as *Virginia Board of Pharmacy*.

To be sure, the California Supreme Court suggested that Nike's speech would not have qualified as "commercial speech" if Nike had discussed international labor issues generically without referring to specific facts about its own operations. *See* Pet. 26a. But that is no more plausible than requiring a lawyer to draft a brief without mentioning any of the facts in the case. Opinions naturally flow from facts, and are certainly more persuasive when they are grounded in facts. The public would in no wise benefit from a constitutional rule that encouraged Nike to assert conclusions without disclosing underlying facts. Under such a bizarre regime, the public would receive less information from Nike and would have less basis for undertaking an intelligent assessment of Nike's statements. As this Court has noted, "public debate must not only be unfettered; it must also be informed." *Bellotti*, 435 U.S. at 783 n.18 (internal quotation omitted).

The net effect of the California Supreme Court's rule would be to subject speech by businesses on important public

policy matters — but not competing speech by their opponents — to the reduced protection accorded "commercial speech." In this case, anti-globalization campaigners would be allowed to speak on an unqualified basis, but Nike's speech on the same issues would be restricted. In effect, this rule merely discriminates on the basis of the identity of the *speaker*, in violation of the well-established principle that the government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392; *see also Bellotti*, 435 U.S. at 777 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); *Pacific Gas*, 475 U.S. at 8 (noting that "[t]he identity of the speaker is not decisive in determining whether speech is protected" and adding that "[c]orporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster") (internal quotation omitted).

The principle that the government must remain neutral among speakers is but a corollary of the broader neutrality principle in First Amendment jurisprudence, which recognizes that there is "an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quoting Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of The People* 27 (1948)). Thus, for example, the Court has long held that government regulations that discriminate on the basis of viewpoint are presumptively unconstitutional. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-12 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-30 (1995); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641-43 (1994); *R.A.V.*, 505 U.S. at 392.

Suppressing speech on a matter of public concern merely because the speaker is a corporation would run contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *Sullivan*, 376 U.S. at 270. Because Nike's speech had no connection with the sale of specific goods or services, and did not even promote the attributes of its goods or services, it should not be treated as "commercial speech."

C. If Nike's Editorializing Is Found To Constitute "Commercial Speech," It Should Still Be Entitled To The Highest Constitutional Protection.

Even if this Court concludes that Nike's speech is "commercial," that should not be the end of the matter. In the past, this Court has "followed an uncertain course" not only as to the definition of "commercial speech," but also as to the level of protection to which "commercial speech" is entitled. *See Lorillard*, 533 U.S. at 574 (Thomas, J., concurring in part and concurring in judgment). In some cases, this Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress [it]." *44 Liquormart*, 517 U.S. at 501; *see also Discovery Network*, 507 U.S. at 424 (stressing that courts should not "place too much importance on the distinction between commercial and noncommercial speech"). But in other, mostly older cases, the Court has held the "commercial speech" label to be dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

In three of its most recent "commercial speech" cases, the Court has only added to the uncertainty. In *United Foods*, the Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 533 U.S. at 409-10 (citing opinions of Stevens and Thomas, JJ.). But the Court concluded that it "need not enter into the controversy"

because the restriction at issue in that case could not be upheld under any standard. *Id.* at 410.

In *Lorillard*, the Court recognized that a *majority* of the Justices have criticized *Central Hudson*, but again concluded that the restriction at issue failed even the *Central Hudson* standard:

> Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. *See, e.g.*, [*Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 197 (1999)] (Thomas, J., concurring in judgment); [*44 Liquormart*, 517 U.S. at 501, 510-14] (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

533 U.S. at 554-55; *see also id.* at 571 (Kennedy, J., concurring in part and concurring in judgment) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required to "consider whether *Central Hudson* should be retained in the face of the substantial objections that can be made to it"); *id.* at 575 (Thomas, J., concurring in part and concurring in judgment) (noting that "there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

Most recently, in *Thompson v. Western States Medical Center*, 122 S. Ct. 1497 (2002), the Court expressly noted

that "several Members of the Court have expressed doubts about the *Central Hudson* analysis," *id.* at 1504. Again, however, the Court declined "to break new ground," in part because "[n]either party . . . challenged the appropriateness of applying the *Central Hudson* framework." *Id.*

The simplest way to resolve this case would be to hold that Nike's speech did not qualify as "commercial speech." If this Court were to conclude to the contrary, however, it should also take this opportunity to confirm that "commercial speech" is not invariably given a lower level of protection. At least where speech by corporations implicates important public policy matters, and does not even refer to the attributes of goods or services offered for sale, it should be afforded heightened protection. Such an approach would also be more consistent with the Court's assertion that the determination whether speech is "commercial" is "a matter of degree." *Discovery Network*, 507 U.S. at 423. Members of this Court have frequently suggested that it would be inappropriate to take an excessively rigid approach as to whether speech is "commercial" or not. *See Lorillard*, 533 U.S. at 575 (Thomas, J., concurring in part and concurring in judgment) (expressing "doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (commenting on the "artificiality of a rigid commercial/noncommercial distinction").

This case amply demonstrates the danger of automatically subjecting all "commercial" speech to lower protection. Under the California Supreme Court's approach, Nike's speech will be entitled to *no protection at all* if it is later determined to be inaccurate in any respect, and will be entitled only to very limited protection even if it were stated with complete accuracy. *See* Pet. 10a. Nor, as we have seen, are the implications of this case limited to Nike. As matters stand in California, most corporate speech may now be

treated as "commercial" speech. Companies in California are therefore faced with the undesirable choice of remaining quiet on important public policy debates, including those involving their own operations, or facing strict liability for any misstatements they may make in the context of heated and fast-moving debate. The latter risk is far from trivial: at least one other similar lawsuit has already been filed in California against eighteen national and international clothing suppliers and retailers. *See Union of Needletrades Indus. & Textile Employees, AFL-CIO v. The Gap, Inc.*, Cal. Super. Ct. No. 300474.

And the implications of the California Supreme Court's decision are not limited to the State of California alone. The increasingly widespread dissemination of corporate speech means that the law applied in the least protective jurisdiction effectively governs the national, and indeed worldwide, statements of thousands of corporations. If California aggressively punishes this kind of speech, then corporate speakers that do business in California will effectively be chilled from engaging in that speech at all.

The need to put an immediate halt to the California Supreme Court's effort to broaden the "commercial speech" doctrine is plain enough. And the need for the Court to offer more comprehensive guidance to the lower courts is equally plain. The currently prevalent uncertainty as to when speech will be treated as "commercial," and what level of protection "commercial" speech will receive, can only "inhibit the exercise of [First Amendment] freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation omitted). The Court should take this opportunity to reconcile its confusing and contradictory precedents, and thereby bring much-needed clarification to this important corner of First Amendment law.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and remand for the case to be dismissed.

Respectfully submitted,

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February 28, 2003

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF AMICI CURIAE THE ASSOCIATION OF NATIONAL ADVERTISING, INC., THE AMERICAN ADVERTISING FEDERATION, AND THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES IN SUPPORT OF PETITIONERS

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40 pp

QUESTIONS PRESENTED

1. Does the California Supreme Court's "limited-purpose" test for determining whether speech by a corporation is commercial or noncommercial speech violate the First Amendment?

2. If Nike's speech is deemed commercial speech, did the California Supreme Court violate the First Amendment by failing to properly apply the *Central Hudson* test?

3. Are Sections 17204 and 17535 of the California Business and Professions Code unconstitutional as applied by the court below because the statutes are vague and overbroad and allow a private party to sue without showing any harm from the speech in question?

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TABLE OF CITED AUTHORITIES

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Cases:

44 Liquormart, Inc. v. Rhode Island,
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Barrus v. Sylvania,
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Bates v. State Bar,
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Bigelow v. Virginia,
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Bolger v. Youngs Drug Products Corp.,
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Brandenburg v. Ohio,
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City of Ladue v. Gilleo,
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Edenfield v. Fane,
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First Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 8, 10, 27

Florida Bar v. Went For It, Inc.,
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Ford v. Nylcare Health Plans of the Gulf Coast, Inc.,
301 F.3d 329 (5th Cir. 2002) 30

Gertz v. Robert Welch,
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Johnson & Johnson v. Carter-Wallace, Inc.,
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Lorillard Tobacco Co. v. Reilly,
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Miami Herald Publishing Co. v. Tornillo,
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NAACP v. Button,
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N.Y. Times Co. v. Sullivan,
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Philadelphia Newspapers, Inc. v. Hepps,
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Riley v. Nat'l Fed. of the Blind,
487 U.S. 781 (1988) 23

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Rosenbloom v. Metromedia, Inc.,
403 U.S. 29 (1971) 27

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 4, 23

Serbin v. Ziebart Int'l Corp.,
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Simon & Schuster, Inc. v.
Members of the N.Y. State Crime Victims Bd.,
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Thomas v. Collins,
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Va. State Bd. of Pharmacy v.
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Cal. Bus. & Prof. Code § 17500, *et seq.* ..... i, 4, 26

Cal. Bus. & Prof. Code § 17200, *et seq.* ..... i, 4, 26

Other Authorities:

4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:119 (2002) 30

Valerie Richardson, The Washington Times,
PETA takes on California's 'happy cow' ads,
December 30, 2002 16

WEFA Group, Advertising Tax Coalition,
The Economic Impact of Advertising
Expenditures in the United States (1999) 10

Greg Winter, *Circus Trainer Is Acquitted of Abusing A Rare Elephant*, N.Y. Times,
Dec. 21, 2001 14-15

INTEREST OF AMICI CURIAE[1]

The Association of National Advertisers, Inc. ("ANA"), the American Advertising Federation ("AAF"), and the American Association of Advertising Agencies ("AAAA") (collectively referred to as "Amici") respectfully submit this brief amici curiae in support of Petitioners. Counsel for both parties have consented to the filing of this brief.

Amici are the three most important trade organizations in the advertising industry. They are identified in detail in the appendix to this brief. Collectively, Amici and their members are experts in communicating with the public at large. They believe the California Supreme Court's decision below will have a serious effect on the services Amici's members can perform. Amici and their members have a direct and continuing interest in this case and all other cases that threaten the rights of advertisers and their agencies to communicate freely with the public.

SUMMARY OF ARGUMENT

This case is one of the most important free speech cases to come before this Court since *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). It raises fundamental issues that go to the core of the First Amendment—the freedom of public debate about political, economic and social issues. Like the *New York Times* case, there is a claim that a corporate speaker has used commercial speech. Unlike *New York Times*, however, in this case there was no attempt to raise funds, no claim of harm, and the Petitioner was responding to public statements attacking it.

Nike's Speech Is Fully Protected By The First Amendment

The speech at issue in this case should be fully protected under the First Amendment—either because it is not commercial speech or because it is commercial speech deserving of full First Amendment protection. Nike's statements about globalization and its labor practices concerned matters of political, economic

1. Pursuant to Rule 37.6, Amici state that no counsel representing a party in this case authored this brief in whole or in part and that no person or entity other than Amici or their counsel made a monetary contribution to the preparation or submission of this brief.

and social concern and were made in the context of a debate started by its critics. By not recognizing this speech as fully protected, the California Supreme Court has strayed far from this Court's First Amendment jurisprudence.

Amici's Lodging accompanying this brief (the "Lodging") and Point II below demonstrate that in today's world, where corporate speech in advertising takes on so many different forms and addresses issues far beyond the price and quality of goods, it is necessary for this Court to reaffirm the commercial speech doctrine and further clarify that corporate speech is not *per se* "commercial speech." The Court should take this opportunity to set the California Supreme Court back on track, by repeating clearly in the face of the misguided decision below what the Court has said before: (1) that "the core notion of commercial speech . . . [is] 'speech which does 'no more than propose a commercial transaction'" (*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (*quoting Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976))), and (2) that commercial speech is speech that informs consumers "who is producing and selling what product, for what reason and at what price." *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (*quoting Va. State Bd. of Pharmacy*, 425 U.S. at 765).

Clearly speech like Nike's, that is made in connection with a public debate on issues of political, economic and social concern, without mention of the price or quality of a product or service, does not fall within the definition of commercial speech laid down by this Court.

The California Supreme Court Incorrectly Found Nike's Speech To Be Commercial Speech

Serious constitutional questions are posed whenever a state seeks to impose controls on the exercise of speech. This case raises the question of whether a corporation can be subject to litigation and possible liability under the California statutory scheme for engaging in public discourse on political, economic and social issues, where its speech makes no mention of the

quality or price of its products, or even of a product at all, and where the *plaintiff is a private citizen who has not alleged any harm*.

In the decision below, the California Supreme Court applied a new and unprecedented "limited-purpose" test comprised of three elements: (1) a commercial speaker; (2) an intended consumer audience; and (3) a message consisting of commercial facts. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960 (2002). In applying this test, the court below determined that Nike's statements were commercial speech because Nike was a commercial speaker, its intended audience included consumers and its statements contained "factual representations about its own business operations." *See id.* at 963-64. Such a formulation is so broad and sweeping that only in the rarest circumstances would corporate speech not be found actionable.

The California Supreme Court's unprecedented decision makes Nike face potential liability for participating in a public debate. Nike became one of several corporations targeted in an intense public debate on globalization. In response to the public criticism made against it, Nike disseminated in press releases, letters to universities, interviews and in an advertisement, statements concerning the international campaign for labor rights and reform, the cost of foreign labor and its own labor practices abroad. Such statements—whether asserted against a corporation or by a corporation—are not commercial speech and deserve full First Amendment protection.

The California Supreme Court's Application of* Central Hudson *violates the First Amendment

The analysis of commercial speech prescribed by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), has generally stood the test of time.[2]

2. Under *Central Hudson* and its progeny, for a restriction on commercial speech to be upheld (1) the commercial speech must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation in question must directly and materially advance the governmental interest asserted; and (4) the (Cont'd)

The test adopted by the California Supreme Court improperly applied the *Central Hudson* analysis. The State of California cannot meet its burden to show that California's statutory scheme is not more extensive than necessary to serve a substantial government interest.[3] The California statutes impose strict liability and allow a private citizen to bring an action, without alleging any harm whatsoever, based only on an allegation that the public is likely to be deceived by the speech. Corporations are left with totally inadequate guidance as to what is and what is not actionable commercial speech. The result is that advertisers and their advertising agencies will be forced to steer far wide of this "unlawful zone" of speech, in fear of being hauled into the courts of California. *See N.Y. Times*, 376 U.S. at 725. As this Court held in *New York Times*, such a result violates the First Amendment. *Id.*

Even if Nike's statements could be found to be commercial speech, they still would be entitled to full First Amendment protection. Nike's statements said nothing about the price or quality or other attributes of its products. In his concurrence in *Rubin*, Justice Stevens explained that any effort to treat commercial speech differently from its non-commercial cousin should be based on a careful functional analysis of the justification for greater regulation. 514 U.S. at 494-96 (Stevens, J., concurring). In this case, the first commercial speech case before the Court where the government is not a party, no such analysis was made by the court below.

Finally, as applied by the California Supreme Court, the California statutes are unconstitutionally overbroad and vague. To state a claim under the statutes, a plaintiff need merely allege

(Cont'd)
regulation must not be more extensive than is necessary to serve that interest. 447 U.S. at 566; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

3. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, (West 2003) and its false advertising law ("False Advertising Statute"), CAL. BUS. & PROF. CODE § 17500, *et seq.* (West 2003).

that a statement is likely to deceive the public. Such a vague standard fails to adequately delineate between what is and what is not proscribed conduct under the statutes.

Amici respectfully submit that this Court should reverse the decision below and strike down the California statutes as unconstitutional.

I. The California Supreme Court's "Limited-Purpose" Test Violates The First Amendment Because Nike's Speech Is Fully Protected Noncommercial Speech

The California court developed a novel and unprecedented "limited-purpose" test to define what is commercial speech. It held that commercial speech occurs wherever there is a commercial speaker, an intended consumer audience and a message consisting of commercial facts. This formulation is a gross distortion of this Court's demarcation between commercial and noncommercial speech. The court found that Nike's statements were commercial speech because Nike is a corporation, it intended its statements to reach consumers and its statements contained factual representations about its own business operations. *See Kasky*, 27 Cal. 4th at 963-64. However, this determination leaves little speech by any corporation that would be noncommercial speech. Only speech that does no more than propose a commercial transaction should subject a corporation to suit under California's statutes. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765. Nike's statements do not propose a commercial transaction, and thus the California court's decision that the statements are commercial speech must be reversed.

Discussion of "public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (*citing NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). The First Amendment gives all speakers the right to try to persuade the listener of the rightness of their position. *Id.*

Nike's advertisement and its other speech were part of a public debate surrounding its labor practices, globalization and Nike's role in the world economy. Public interest groups, labor

unions and others had made public statements attacking Nike, and called for the boycott of its products. Nike, the object of criticism, was merely responding in the only way it knew how—through public speech. Corporations, speaking through advertising, press releases and other public statements, should be afforded the same protections in responding to such attacks as those who initiated the debate. If not, the various people who speak on behalf of a corporation will be in a quandary as to how to respond. For example, the CEO will not know how to answer questions from the press and the public relations staff and other employees will not know how to address inquiries from the public.

A. This Court's Decisions In *Thornhill* And *Thomas* Held That Speech Like Nike's Is Protected By The First Amendment

Thornhill v. Alabama, 310 U.S. 88 (1940), and *Thomas v. Collins*, 323 U.S. 516 (1945), concerned debates regarding issues of public concern and are thus dispositive here. Like the speakers in *Thornhill* and *Collins* and their progeny (including the *New York Times* in *New York Times v. Sullivan*), the fact that Nike, and other advertisers like it responding to public criticism, have an economic interest in the political speech debate does not make their speech any less protected. *See, e.g., Va. State Bd. of Pharmacy*, 425 U.S. at 762 (finding economically motivated speech to be protected by the First Amendment).

In *Thornhill*, which concerned a state ban on picketing in labor disputes, this Court explained that speech concerning "satisfactory hours and wages and working conditions in industry" is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill*, 310 U.S. at 103. Moreover, this Court opined:

> *Every* expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful

> discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

Id. at 104 (emphasis added). The California Supreme Court's view that the state may restrict petitioners' speech as commercial speech goes against this reasoning in *Thornhill*. The State may not "impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern." *Id.*

The California Supreme Court's decision is blatant viewpoint and content discrimination. The California court's suggestion that it would be possible for Nike to discuss globalization and address its accusers in general terms, without mentioning facts specific to its business activities (*See Kasky* 27 Cal. 4th at 966), is not only a poor and meaningless solution, but also constitutes improper censorship. *See Thomas*, 323 U.S. at 535-537 (finding a requirement that speakers split their remarks apart is improper suppression of speech).

In *Thomas*, which found that the First Amendment protects both employers and employees with respect to a ban on solicitation of union membership, the Court held: "When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end." *Thomas*, 323 U.S. at 536-537. Like the speaker in *Thomas*, Nike should not be confined to speaking about globalization and labor practices in the abstract. Nike is entitled to the same freedom of expression granted in *Thomas* and should be free to engage in the debate concerning its labor practices, which are the modern day version of the exact issues in *Thomas*. The California court's new theory, that Nike should be deprived of its First Amendment protection because statements about its labor practices may influence the buying decisions of a segment of the population, is unprecedented and incorrect.

B. The Court Below Improperly Focused On The Speaker Rather Than The Content Of The Statement

The California Supreme Court's "limited-purpose" test makes the identity of the speaker the dispositive factor in determining whether speech is commercial speech. In focusing on the speaker rather than the content of the speech, the California Supreme Court failed to recognize the public's right to hear and evaluate, and then accept or reject, Nike's speech. The public's interest is substantial—its right to receive the free flow of information from all sides of the debate must be met. Advertisements, press releases and other public statements all carry information of import on significant issues of the day. The California Supreme Court's decision flies in the face of this Court's critical statement in *First Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978), that it is impermissible for there to be a "prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues. . . ." Where, as here, the law gives "one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86 (footnote omitted).

In effect, the California Supreme Court has determined that the public needs to be safeguarded from Nike's speech, and speech like it. But, there is no danger from which the public needs to be protected. It may be that certain individuals choose to purchase or not to purchase products based upon a corporation's business practices. These decisions are made separate and apart from any consideration of the price or quality of the products and services being purchased. Commercial speech is not at issue in such a situation, but rather something more akin to the First Amendment notion of freedom of association. *See 44 Liquormart, Inc.*, 517 U.S. at 502 ("It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'") (*quoting Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).

If someone feels that they have been misled into associating with a corporation, and the individual's sole harm is the association itself, the solution is not to restrict that corporation's speech, but to keep the dialogue of the debate open so that the individual has all the information available to him or her necessary to make an informed decision. To ostensibly "protect" citizens by limiting a corporation's ability to speak freely when there is no cognizable harm is the essence of paternalism. And, this Court has repeatedly rejected and scorned attempts to restrict speech for reasons amounting to paternalism. *See, e.g., Va. State Bd. of Pharmacy*, 425 U.S. at 770; *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 631 n.2 (1995).

Furthermore, the court below misses the point in arguing that Nike's speech is protected as long as it is not false or misleading. As this Court noted in *New York Times*, quoting John Stuart Mill, "even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *N.Y. Times*, 376 U.S. at 279 n.19. We do not protect false speech for its own sake. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986). "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth. . . . [E]rroneous statement is inevitable in free debate. . . ." *N.Y. Times*, 376 U.S. at 271-72. There can be no "strict liability" for First Amendment protected speech.

It must be remembered that Nike was the subject of a public attack here by groups who had their own interests that were adverse to Nike's. Nike's ability to respond and participate in the public debate without being subject to a regime of scrutiny that is not applicable to its attackers is the essence of the protections of the First Amendment. That such a response includes paid advertising does not change the legal analysis because there are many alternative forms of free public speech,

such as statements made to the press, public demonstrations and boycotts, available to anyone wishing to voice an opinion.

The public at large, in addition to Nike's actual and intended customers, has the right to receive information from all sides of this international debate. "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (internal footnote omitted). The First Amendment serves an "informational purpose" that guarantees "the public access to discussion, debate, and the dissemination of information and ideas." *Bellotti*, 435 U.S. at 782 n.18; *see also Bigelow v. Virginia*, 421 U.S. 809, 822 (1975). Thus, not only Nike, but all of us, will lose if the California Supreme Court's failure to protect Nike's speech is upheld.

II. Amici's Lodging Illustrates The Far-Reaching And Chilling Impact Of The Decision Below

Since the very beginning of this nation, advertising has played an important role in our society. *See, e.g., 44 Liquormart, Inc.*, 517 U.S. at 495-96. A robust discourse through advertising encourages competition, provides useful information to a wide audience and helps generate jobs. *See* WEFA GROUP, ADVERTISING TAX COALITION, THE ECONOMIC IMPACT OF ADVERTISING EXPENDITURES IN THE UNITED STATES (1999). As technological advances make communicating across the world easier, advertising, as an important means of such communications, has evolved as well. Through the work of the advertisers and the agencies whom Amici represent, advertisements are created every day and placed in all forms of media so that individuals, the government and organizations, both in the for-profit and not-for-profit worlds, are able to convey their message to their intended audience efficiently and effectively.

For corporate speakers, advertising is not only a way to promote a particular product, but also a way to add their unique voices to the chorus of debate regarding issues of public concern. This may occur in a variety of ways: through sponsorship of events and programs, product placement in film and television

programs, banner advertising on the Internet and through the use of traditional advertising techniques, such as advertisements in all forms of print media, outdoor billboards and television and radio commercials. Simply because speech appears in the form of a paid advertisement, does not mean that it is commercial speech. The corporate speaker, like an individual speaker, may choose to use advertising not just for self-promotion, but also to promote a certain cause or opinion.

In creating advertisements, a company's goal may be to publicize its corporate image by, for example, showing how it is a good public citizen, or by taking sides on a public issue or by responding to criticism. This type of image advertising may, at the end of the day, make the public feel good about the company and thereby help sell products to a certain segment of the public. However, this corporate image speech is not commercial speech and the California Supreme Court's decision to the contrary must be rejected.

The California Supreme Court has in effect placed a gag order on corporate speakers from entering the public discourse through advertising. In addition, the California Supreme Court's decision has turned corporate speakers' use of public relations tools such as press releases, correspondence and interviews into *de facto* actionable conduct as commercial speech. Under the California Supreme Court's new test, any time a corporation's speech includes mention of facts about its business operations, the speech is transformed into commercial speech.[4] *See Kasky*, 27 Cal. 4th at 961, 964. In order to fully understand the impact of this ruling, Amici have lodged with the Court examples of print, television and radio advertisements that show the types of advertisements that could fall within the California Supreme Court's definition of actionable commercial speech. *See* Lodging at L-2 to L-16. Through the Lodging, Amici have attempted to provide the Court with a representative small sampling of the

4. The California Supreme Court's decision makes no distinction between paid and unpaid utterances. Amici, as representatives of the advertising industry, are most concerned here with speech in paid advertisements.

type of speech that will be chilled if the California Supreme Court's decision is permitted to stand.

Based on the California Supreme Court's ruling, courts in California could now find advertising like that in the Lodging to be commercial speech. As a result, advertisers and advertising agencies could be subject to expensive and time-consuming litigation for merely exercising their First Amendment rights by participating in the course of a public debate. In order to prevent this injustice, Amici believe that this Court should now make clear again that corporate speech, such as the advertising in this Lodging, that bolsters a corporation's opinion or image, but does not explicitly propose the purchase of a particular product or service, is not commercial speech and is fully protected by the First Amendment. *See Va. State Bd. of Pharmacy*, 425 U.S. at 765.

The majority of the advertisements presented in the Lodging fall into three broad categories (although there is overlap among them): (1) advertisements placed in direct response to specific public criticism or specific events ("Responsive Advertisements"); (2) advertisements placed to express a commitment to social responsibility ("Social Responsibility Advertisements"); and (3) advertisements placed to weigh in on a debate of public interest ("Public Debate Advertisements"). These advertisements, like the Nike advertisement, contain overtly political or social messages without any explicit mention of a commercial transaction. However, under the California Supreme Court's ruling, because these advertisements contain facts about a company's business practice, they, and other advertisements like them, could be subject to the restrictions of California's UCL and False Advertising Statute.

A. The Nike Advertisement

There is only one paid advertisement at issue in this case; the other statements complained of are found in press releases and letters to newspaper editors and university presidents and athletic directors.[5] Plaintiff alleged that this advertisement, in

5. The advertisement is annexed as Exhibit FF to the *Kasky* Complaint.

and of itself, was false and misleading in violation of the UCL and False Advertising Statute. *See Kasky* Complaint at ¶¶51-58. The California Supreme Court's decision discussed the advertisement together with the statements made to the press and university officials. *See, e.g., Kasky*, 27 Cal. 4th at 947–48. In making its determination about the speech complained of, the California court did not find, as it should have, that the advertisement was not commercial speech. While Amici also believe that Nike's statements to the press and university officials are not commercial speech, as representatives of the advertising industry, Amici have chosen to focus on demonstrating here why Nike's advertisement and advertisements like it are fully protected speech.

The advertisement is a simple, traditional print ad, placed by Nike in the *New York Times*, the *Washington Post*, the *San Francisco Chronicle* and other national newspapers. *See* Lodging at L-1. It begins with a quote attributed to Ambassador Andrew Young: "It is my sincere belief that Nike is doing a good job . . . but Nike can and should do better." The rest of the ad consists of three short paragraphs:

> After six months of investigation, visiting twelve Asian factories and interviewing hundreds of workers in Indonesia, China, and Vietnam about Nike's overseas labor practices, this was how Andrew Young concluded his independent 75-page report, released yesterday.
>
> Nike agrees. Good isn't good enough in anything we do. We can and will do better.
>
> For details on exactly how—and for a complete copy of Ambassador Young's report and recommendation—please call 1-800-501-6295, go to www.nike.com/report, or go directly to GoodWorks at www.digitalrelease.com and enter the keyword: GoodWorks.

At the bottom of the advertisement is the Nike "swoosh" symbol. *See* Lodging, L-1.

The Nike advertisement does nothing more than draw the public's attention to Andrew Young's conclusions in general in his report of his investigation of Nike's labor practices. It does not include any facts from the report itself. Moreover, Nike's references to its business practices, if indeed there are any, are nothing more than its opinion that it agrees with Ambassador Young's report and that it is striving to "do better" with regard to its overseas labor practices. Yet, almost inconceivably, the California Supreme Court found that this was actionable commercial speech.

In its decision, the California Supreme Court found the statements in the Nike advertisement were "making factual representations about its own business operations." *Kasky*, 27 Cal. 4th at 963. This ignores the context in which these statements were made—Nike was defending itself against attack on an issue that had garnered the attention of the public at large. Nike's speech is core First Amendment speech and imposing strict liability on such speech goes against the First Amendment's purpose of protecting "uninhibited, robust and wide-open" debate. *N.Y. Times*, 376 U.S. at 270. Nike's speech here is similar to that of other corporations responding to public criticism, engaging in public debate or generally speaking to issues of social concern. If an advertisement like Nike's that so clearly is not proposing a commercial transaction can be found actionable commercial speech, a vast array of other corporate advertising also will be swept into California's vague and onerous regulatory quagmire.

B. Responsive Advertisements

1. Ringling Bros. and Barnum & Bailey

In 2001, accusations by members of People for the Ethical Treatment of Animals ("PETA") prompted the filing of a criminal complaint in San Jose, California against Mark Oliver Gebel, an elephant trainer with Ringling Bros. and Barnum & Bailey circus ("Ringling Bros."), alleging cruelty to elephants in violation of the California penal code. On December 21, 2001, after a trial, Mr. Gebel was acquitted of the charges. *See* Greg Winter, *Circus Trainer Is Acquitted of Abusing A Rare Elephant*,

N.Y. TIMES, Dec. 21, 2001 at A15. Subsequently, Ringling Bros. placed an advertisement entitled "An Open Letter to Animal Rights Groups," signed by Kenneth Feld, Ringling Bros.' Chairman and Producer. Lodging at L-2. In the advertisement Ringling Bros. makes the following statements:

> After sitting through a trial in San Jose California, that should never have come to court, and witnessing a senseless waste of taxpayer's money, I am writing with the hope of appealing to your heart, your conscience and your common sense.
>
> *****
>
> I am appealing to you to use the millions you raise from your well-intentioned members to positively affect the lives of animals who are starving, ill, overpopulating, and dying in habitats that can no longer support them. Instead, your resources are being spent attacking Ringling Bros. and Barnum & Bailey® and other responsible organizations such as licensed zoos and aquariums who care for, raise, live, work, and play with their endangered animal partners under carefully regulated laws enforced by the United States Department of Agriculture.
>
> *****
>
> Ringling Bros. and Barnum & Bailey does not take animals out of the wild, and we have not done so for over 26 years. . . . The truth is no one is more concerned with the well-being of animals than Ringling Bros. . . . Our animal partners are healthy, well cared for, and content, and we know that because we have individual relationships with each and every one of them.

Under the California Supreme Court's ruling, by responding to attacks against it through the placement of advertisements like the one above, Ringling Bros. would be putting itself at risk of litigation under the UCL and the False Advertising Statute. Such a lawsuit could be brought by any citizen of California. One can imagine a member of PETA bringing a claim

because it believes that the statement that Ringling Bros.' animal partners are "content" is false and misleading.[6] If the California Supreme Court's decision is not overruled, such a lawsuit would be permitted to proceed. Quite simply, what was intended by Ringling Bros. as an opportunity to voice its opinions after a highly publicized trial and engage in debate with its critics, has been transformed by the California Supreme Court into actionable commercial speech, despite the fact that at no point in the advertisement does Ringling Bros. encourage people to attend a performance of its circus.

2. ExxonMobil's message

On the twelfth anniversary of the Exxon Valdez incident, ExxonMobil placed an advertisement entitled "Pounds of prevention, tons of cure." Lodging at L-3. In the advertisement, ExxonMobil explains that after the spill, "[t]anker safety became a public issue overnight," and then details its efforts to improve its business practices in this area, including the establishment of an "augmented safety and environmental management system," investment in "advanced navigational systems," "upgrad[ing] vessel inspections and repairs," changing tanker routes, expanding training of employees and performing random drug and alcohol testing of employees in "safety-sensitive positions."

ExxonMobil also promotes its improved record of tanker safety, including the following statements:

> In the last four years, our owned ships have transported more than *2.8 billion* barrels of oil worldwide, and lost less than *10 barrels*.

The advertisement concludes with the following thought:

> Tanker safety demands vigilance, systematic management, industry-wide cooperation and

6. Indeed, in another context, PETA has brought an action under the same statutes at issue in the present case against the California Milk Advisory Board. In the complaint PETA alleges that the statements "Great cheese comes from happy cows," and "Happy cows come from California," are false and misleading because, as alleged by PETA, the cows are, in fact, not "happy." *See* Valerie Richardson, THE WASHINGTON TIMES, *PETA takes on California's 'happy cow' ads*, December 30, 2002.

> responsible regulatory oversight. All are needed to ensure that the public and the environment are as safe as we can make them.

Here, ExxonMobil used advertising to inform the public of its commitment to safety and emergency response in light of the Exxon Valdez incident and to publicize its improvement with regard to the occurrence of oil spills. The context of the message is clearly rooted in public concern about tanker safety, and it is common sense that ExxonMobil should have an opportunity to bring its voice to the discussion of this issue. However, because the advertisement also mentions facts about ExxonMobil's business practices, the California Supreme Court could permit a UCL action to go forward concerning such an advertisement, thus moving the debate from a nationwide forum of United States citizens to a jury of six in a California courtroom.

C. Social Responsibility Advertisements

Texaco has extensively promoted its commitment to a diverse workforce in a variety of advertisements.[7] Here, Texaco uses the opportunity of placing advertisements in the public eye in order to demonstrate that it is a socially responsible company and to project a positive corporate image.

One such print advertisement is entitled "Texaco: Delivering On Diversity." Lodging at L-7. It includes a photograph of Texaco's Corporate Director of Human Resources and begins with the statement, "THE PERFORMANCE OF TEXACO, INC. has proven that they have a commitment to increasing the

7. *See, e.g.*, Texaco radio advertisement, "Business Relations: African Americans," Lodging at L-4; Texaco print advertisement, "Texaco Is Committed to Minority Business Development," Lodging at L-5; Texaco print advertisement, "At Texaco, we're dedicated to developing diverse sources of energy," Lodging at L-6. Texaco is not alone in its diversity advertising campaigns. *See* American Express print advertisement, "Diversity is the Nature of our Business," Lodging at L-8; Xerox print advertisement, "A Bunch of Copies, 6 people sitting at a table," Lodging at L-9.

diversity of their workforce." The advertisement then includes the following statements:

> From January 1997 through June 1998, minorities and women comprised 69% of all newly hired employees. During that same period, minorities and women also earned 55% of all promotions.
>
> Texaco has also instituted a five-year, $1 billion plan to increase relationships with businesses owned by minorities and women. During the first 18 months of the plan, Texaco's expenditures with minority and women owned businesses totaled $404 million, exceeding their goal for this period by 35%.
>
> "Respect for the individual," one of Texaco's 10 core values, is at the forefront of all of the company's initiatives.

Texaco is expressing its opinion that diversity is important, while also mentioning certain of its business policies and practices that are emblematic of its commitment to diversity. There is, however, no suggestion that consumers should buy Texaco's gasoline or other products. Yet, because the advertisement includes facts about Texaco's business practices, under the decision below, the speech in this advertisement leaves Texaco open to the possibility of defending a lawsuit under the UCL and False Advertising Statute. For example, a California citizen could allege that the statement that Texaco thinks diversity is important is misleading because Texaco has been the object of complaints of discrimination.[8]

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8. Other companies similarly could be at risk for promoting their own "good works" programs. *See* ExxonMobil print advertisement, "A responsible path forward on climate," Lodging at L-10 (promoting its alliance with the Global Climate and Energy Project); Johnson & Johnson television advertisement, "Support of Children," Lodging at L-11 (promoting its projects that concern the health and welfare of children); Dawn television advertisement, "Duck's Life Saved From Oil Spill," Lodging at L-12 (promoting its assistance to animals harmed by the environment and related initiatives); Dawn print advertisement, "Mallard Duck," Lodging at L-13 (same).

D. Public Debate Advertisements

During the national debates on health care, Aetna placed a print advertisement entitled "Fixing Health Care Isn't Exactly Brain Surgery. (If Only It Were That Easy.)"[9] Lodging at L-14. Aetna begins by candidly speaking about the politics of healthcare, and sharing its opinion as to what is most important:

> About the only aspect of the health care debate any two people might agree on is that the system needs work. Some might say considerable work. That said, we'd like to weigh in with a few ideas of our own since we're actually in the position to do something about it. First of all, the paramount focus of health care must be quality.

Aetna then enumerates its "ideas" and makes the following statements:

> [W]e send timely reminders that encourage members to see their doctors for immunizations to prevent illness and to get screenings that help physicians diagnose disease early enough to do something about it. If at first they don't respond, we remind and remind again. Just one result is a significant reduction in late-stage breast cancer.
>
> [W]e've created outreach efforts that have reduced asthma emergencies 60%, promoted eyesight-saving laser therapy for diabetics and improved the quality of life for people with congestive heart failure.

Aetna is clearly presenting its political views on the health care debate to the public. Like any individual, Aetna has a right to be heard. Because the advertisement also contains factual statements about Aetna's business practices and their effects, however, this advertisement could be actionable commercial speech in the eyes of the California Supreme Court. As a result,

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9. Aetna was not alone in entering the health care debate. *See, e.g.*, Blue Cross Blue Shield Pennsylvania television advertisement, "Health Care Reform," Lodging at L-15.

important opinions about critical issues of the day that should be heard by the citizenry will be chilled.[10]

E. The *Kasky* Decision May Lead To A Major Chilling Of Speech If This Court Does Not Reverse The Decision Below And Clarify The First Amendment Protection Of Corporate Speech

Near the end of its opinion, the California Supreme Court maintains that "speech represent[ing] expression of opinion or points of view on general policy questions . . . is noncommercial speech subject to full First Amendment Protection." *Kasky*, 27 Cal. 4th at 967. Amici, of course, agree with this statement. However, this statement is belied by the court's conclusion that "product references" transform noncommercial speech into commercial speech. The court explained its understanding of "product references" as follows:

> [W]e understand 'product references' to include . . . for example, statements about the manner in which the products are manufactured, distributed, or sold, about repair or warranty services that the seller provides to purchasers of the product, or about the identity or qualifications of persons who manufacture, distribute, sell, service, or endorse the product. Similarly, references to services would include not only statements about the price, availability, and quality of the services themselves, but also, for example, statements about the education, experience, and qualifications of the persons providing or endorsing the services.

Id. at 961 (citation omitted).

The California Supreme Court concedes that this definition is "broad." Its justification for casting such a wide net is the

10. Likewise, other companies who encourage the promotion of certain positions will be silenced. *See, e.g.,* Mobil print advertisement, "Climate change: a degree of uncertainty," Lodging at L-16 (advertisement encouraging officials in Kyoto gathered to discuss the environment to "commit themselves to meaningful actions" and specifying what those actions should be).

need "to adequately categorize statements made in the context of a modern, sophisticated public relations campaign intended to increase sales and profits by enhancing the image of a product or of its manufacturer or seller." *Id.* at 961-62. However, a company's "image" is not product information that should be classified as commercial speech because there is no risk of *commercial harm* to the consumer. *See, e.g., Bolger*, 463 U.S. at 81 (Stevens, J., concurring) ("The interest in protecting consumers from *commercial harm* justifies a requirement that advertising be truthful") (emphasis added).[11] Because all corporate speech contributes in some way to a company's image, if the California court's decision prevails it will be virtually impossible for corporate speech to *ever* be deemed fully protected noncommercial speech.

Consider, for example, if an automobile manufacturer broadcasts a commercial asking the public to "Buckle Up For Safety!" and the advertisement prominently displayed the automobile manufacturer's logo. This advertisement is clearly meant to improve the image of the automobile manufacturer by portraying it as a corporate citizen concerned about safety. However, one can imagine a California resident arguing that an implied message of this advertisement is that "although we sell cars, we care about people." Because this advertisement attempts to persuade consumers that the automobile manufacturer is a "good company," it could fall within the California Supreme Court's definition of commercial speech. If the California statutes are indeed so far-reaching as to include this type of speech as commercial speech, messages that are of import to the public, such as "everyone should wear seatbelts," will not be heard.

11. In *Bolger*, the Court was specifically concerned that references to public issues in advertisements "should not be permitted to immunize false or misleading product information from government regulation." 463 U.S. at 68. In the present case, the California Supreme Court is attempting to regulate advertisements that have no mention of "product information," and *only* references to public issues.

The California Supreme Court has placed the definition of commercial speech on a runaway train. The decision ignores the *Virginia State Board of Pharmacy* holding that commercial speech is speech that "does nothing more than propose[] a commercial transaction" and instead has defined commercial speech to include virtually every corporate utterance. *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (*quoting Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

It is time for this Court to clear any such confusion and return to the roots of its commercial speech jurisprudence. In keeping with *Virginia State Board of Pharmacy*, commercial speech should be understood to only include speech that refers to the price or the quality of the product being sold; where no specific item is being sold, the speech should not be considered commercial speech.[12] Commercial speech "inform[s] the public of the availability, nature and prices of products and services." *Bates v. State Bar*, 433 U.S. 350, 364 (1977). Companies themselves should not be considered the "product" for commercial speech purposes. The consumer's concern is about the price of the product and whether the product works as it should. To the extent that a consumer brings his or her own political views about the company into purchasing decisions, the consumer is taking the purchase out of the realm of commercial speech and into the realm of political, noncommercial speech. To the extent corporations make representations about their political views and practices, that speech is political, noncommercial speech, as well.

12. If an advertisement contains both commercial and noncommercial speech, the clearly noncommercial speech should be sifted out. If the residual speech does not propose a commercial transaction, the advertising should not be considered commercial speech.

III. Even If Nike's Speech Is Deemed Commercial Speech, Under The Proper Application Of *Central Hudson*, This Court Should Reverse The California Supreme Court

As the Court recently explained in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001), "[f]or over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment. Instead, the Court has afforded commercial speech a measure of First Amendment protection 'commensurate' with its position in relation to other constitutionally guaranteed expression." (citations omitted). In *Central Hudson* and its progeny, the Court affirmed its commitment to uninhibited, robust and wide-open debate and developed the well-known four-pronged test to determine whether a particular restriction of commercial speech does not violate the First Amendment. 447 U.S. at 566; *Rubin*, 514 U.S. at 489; *Edenfield*, 507 U.S. at 767.

It has long been clear that, while *some* types of speech may receive substantial, but lesser protection—*e.g.*, speech that merely proposes a commercial transaction (*see Va. State Bd. of Pharmacy*, 425 U.S. at 765)—other types of speech, such as the Nike statements, are entitled to full First Amendment protection.[13] Indeed, it is inconceivable that the correct application of *Central Hudson* would stop Nike (or any person or other corporation) from safely responding to charges made against it of unfair labor or other practices without fear of litigation.

The California Supreme Court's decision disregards the constitutional values embraced in *Central Hudson* and the commercial speech cases decided by this Court since 1980. Simply put, the overbroad reach of the California statutes is more extensive than is necessary to serve the government's

13. To the extent that any speaker's statements are found to be "component parts of a single speech" that contains inextricably intertwined commercial and noncommercial elements, all of the speech is entitled to full First Amendment protection. *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 796 (1988).

purported interest in protecting consumers and thus fails *Central Hudson's* fourth prong and violates the First Amendment.

Some members of the Court have questioned whether the *Central Hudson* test should be applied to commercial speech at all. *See, e.g., 44 Liquormart*, 517 U.S. at 517 (Scalia, J. concurring in part and concurring in judgment); *id.* at 523 (Thomas, J. concurring in part and concurring in judgment).[14] Other members of the Court have found the application of balancing tests to the First Amendment to be problematic. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) ("the use of . . . traditional legal categories is preferable to the sort of ad hoc balancing that the Court" performs in First Amendment cases); *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J. concurring) ("[F]airly precise rules are better than more discretionary and more subjective balancing tests."). Amici share these concerns, although they believe that the correct analysis of *Central Hudson* and its progeny would have protected Nike's speech. At the very least this Court should reaffirm *Central Hudson*. But Amici urge the Court to take this opportunity to go beyond *Central Hudson* and find that the strict scrutiny standard should be applied to commercial speech when challenged by a private citizen where no individual harm is alleged.

The present case presents a situation never previously before this Court: a private person has brought an action seeking relief as a result of a corporation's alleged false and misleading speech, in which he has no showing of harm. This is not a case, such as those involving the government or a regulatory agency, which, in the commercial speech area, warrants the intermediate scrutiny of the *Central Hudson* test. Rather, strict scrutiny should

14. In fact, Justices Scalia and Thomas have found historical evidence submitted in other cases by Amici to support the notion that commercial speech is entitled full First Amendment protection. *See 44 Liquormart, Inc.*, 517 U.S. at 517 (Scalia, J., concurring); *id.* at 522 (Thomas, J., concurring).

be applied in private suits where there is no allegation of harm, such as in *Kasky*.

A strict scrutiny test will find a speech statute fatally flawed if there are alternative means of dealing with the false speech. *See Lorillard*, 533 U.S. at 582 ("Under strict scrutiny, the advertising ban may be saved only if it is narrowly tailored to promote a compelling government interest") (citation omitted). Citizens, consumer groups and corporations have many different ways of correcting speech they feel to be false. Indeed, many of those methods, such as boycotts and advertisements, have been used against Nike. Moreover, the substantial state interest that the state has in regulatory cases where the public may be harmed is lacking where corporate speech is attacked and the only conceivable harm is if the public is influenced to have a more positive view of the company as a result of that speech. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In this case, the California court seeks to impose strict liability on the corporate speaker irrespective of its intention. The Chairman of the Board, its counsel, and any corporate employee who speaks out in the public debate, no matter how well meaning, speak at their own risk. Even if they believe it to be true and are relying on reports (such as the Andrew Young report in this case), they cannot utter a word without fear of suit. But a well intentioned speaker whose speech concerns material other than product quality or price should not be held liable in a private action and thus the California Supreme Court should be reversed.

IV. The California Statutes Are Unconstitutional As Applied Because They Are Vague And Overbroad And Allow A Private Party To Sue Without Any Showing Of Harm

California's UCL and False Advertising Statute, as applied by the court below, are unconstitutionally overbroad and vague. The statutes, with few procedural limitations, make it unlawful for any person or corporation to make false

or misleading statements in advertising.[15] Indeed, under these statutes, a private citizen of California can bring an action seeking injunctive relief, disgorgement of all monies obtained through the challenged advertising and an order compelling placement of corrective advertising, all without even alleging that he or she was individually harmed. *See Kasky*, 27 Cal. 4th at 949-51. No other state has gone this far.

A. The Statutes Are Unconstitutionally Overbroad

A constitutional challenge of overbreadth requires a showing that the statute is susceptible of sweeping and improper application affecting protected speech in general. *See Bigelow*, 421 U.S. at 815-817. Because private citizens can bring their own actions under the UCL and False Advertising Statute without alleging harm, there are no state or federal agencies in place to insure that litigation brought pursuant to these statutes is being brought only in connection with actionable commercial speech. Moreover, the potential remedies allowed under the statutes are severe. They include requiring the advertiser to wage a "corrective" advertising campaign against itself. This Court has found that a similar remedy with respect to political and electoral coverage in the press was unconstitutional under the First Amendment. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (holding unconstitutional a statute that required newspapers to publish replies to criticism of political candidates).

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15. § 17200 defines unfair competition as "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . . ." § 17500 makes it unlawful

> for any person, firm corporation or association . . . to make or disseminate or cause to be made or disseminated before the public in this state . . . or . . . from this state before the public in any state . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . .

In *New York Times*, this Court found an Alabama libel law that had similar chilling effects unconstitutional because that law deterred critics of government officials from voicing their criticism in fear of having to incur the expense and responsibility of proving the truth of their statements in court. 376 U.S. 254. The Court explained that such a law resulted in people making "only statements which 'steer far wider of the unlawful zone' . . . [which] dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Id.* at 279 (*quoting Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Importantly, this Court has held that "the burden and expense of litigating the issue . . . would unduly impinge on the exercise of the constitutional rights. '[T]he free dissemination of ideas [might] be the loser.'" *Bellotti*, 435 U.S. at 785 n.21 (*quoting Smith v. California*, 361 U.S. 147, 151 (1959)). That the prospect of time-consuming and financially-draining litigation in and of itself impermissibly chills protected speech is not to be taken lightly. *See, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971). In the present case, although Nike is a large corporation with considerable assets, it may find the cost of defending itself so onerous as to force it to resort to self-censorship. A smaller company, brought to court at the whim of a California citizen, may suffer even greater injury and be forced out of business completely in the face of such litigation.

Because almost any national advertisement reaches the citizens of California—the most populated state in the nation—it is virtually impossible for advertisers and their agencies to immunize themselves from the chilling effects of California's statutes when engaging in a nationwide advertising campaign. The reach of these statutes is not just limited to advertising that is published in California; the statutes also apply to advertising that is disseminated by California citizens and published in other states, regardless of whether those other states have their own false advertising

laws that would not allow a similar action. The chilling effects of these statutes is real and will be felt by Amici and its members. Advertising agencies and their clients throughout the country will be uncertain as to what speech in advertising could be challenged, and thus will have to engage in self-censorship in fear of protracted litigation brought by citizens of California invoking the UCL and the False Advertising Statute

B. The Statutes Are Unconstitutionally Vague

The interpretation of the UCL and the False Advertising Statute as applied by the court below to Nike's speech only increases the chilling effects that these statutes have on protected speech in advertising. *See Bigelow*, 421 U.S. at 815-18 (a challenge of a statute on First Amendment grounds can be brought both on overbreadth grounds generally as well as on the ground that as applied it infringes on appellant's constitutionally protected speech). As the California Supreme Court notes in its decision below, to state a claim under these statutes, a party need only show that members of the public are likely to be deceived by the advertising. *Kasky*, 27 Cal. 4th at 950-51 (*citing Leoni v. State Bar*, 39 Cal. 3d 609, 626 (1985)). Such an interpretation of the requirements of these statutes is unconstitutionally vague.

As this Court has held, a statute is unconstitutionally vague where the line between proscribed and non-proscribed conduct is so ambiguous that its effect is to inhibit persons from engaging in constitutionally protected conduct. *See NAACP v. Button*, 371 U.S. 415, 417-18 (1967). Under the California statutes, the line between speech that is likely to deceive the public and speech that is not likely to deceive the public (the conduct at issue), is beyond vague, it is completely undefined. This puts advertisers in the untenable position of having to be clairvoyant in order to determine what speech the public would likely find deceptive. Such a vague prohibition can lead to extraordinary applications. As Justice Brown in her dissent below explained, "[t]his

broad definition of actionable speech puts a corporation 'at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning.'" *Kasky*, 27 Cal. 4th at 985 (Brown, J., dissenting) (*quoting Thomas v. Collins*, 323 U.S. 535).

C. The Statutes' Failure To Require Harm Is Unconstitutional

The UCL and False Advertising Statute do not require a showing of harm—personal, actual, or even imminent. This is inconsistent with this Court's First Amendment jurisprudence, which is in accord with the notion that a speaker whose speech causes no actual harm should not face any consequences for his or her words. *See Brandenburg*, 395 U.S. at 449 (distinguishing "advocacy" from "incitement to imminent lawless action"). Amazingly, the California court denied Nike its First Amendment rights based on statements that do not concern the inherent qualities of the product and that are not likely to harm consumers in any way. In this case, abstract harms have been allowed to trump real freedoms. Indeed, any harm any consumer might suffer as a result of Nike's speech is unrelated to the composition or quality of the product Nike sells. Nevertheless, the California court seems to believe that such a complaint justifies moving the globalization debate out of a public political forum and into a courtroom.

D. The Statutes Lack The Procedural Safeguards Found In Federal Legislation

Serving the same purpose of protecting consumers, federal legislation has procedural safeguards in place that avoid the unconstitutional shortcomings of the California statues. In order to bring a claim for false or misleading advertising under the Lanham Act (15 U.S.C. § 1125(a)), a plaintiff must demonstrate that it has suffered, or is likely to suffer, commercial or competitive injury as a result of the advertising. *See, e.g., Johnson & Johnson v. Carter-Wallace*,

Inc., 631 F.2d 186, 190 (2d Cir. 1980). As a rule, consumers do not have standing to bring a claim for false or misleading advertising under the Lanham Act, because they do not have a commercial stake in the outcome. *See, e.g.*, *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 301 F.3d 329, 338 (5th Cir. 2002); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1179 (3d Cir. 1993); *see also Barrus v. Sylvania*, 55 F.3d 468 (9th Cir. 1995).

Similarly, the Federal Trade Commission ("FTC") has the power to regulate unfair competitive practices, and may not only seek injunctive relief in the courts, but also commence litigation in federal or state court seeking damages on behalf of competitors or consumers who have been harmed by false or misleading advertising. 15 U.S.C. § 57b. As with the Lanham Act, there is no private right to sue under the FTC Act (15 U.S.C. § 45, *et seq.*). *See* 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 27:119 (2002). It is only the FTC, as a federal agency, that is empowered once there has been a showing of damage, to take action concerning violations of the FTC Act.

By requiring that the plaintiff allege an injury and by not allowing just any private citizen to bring a claim, the Lanham Act and the FTC Act avoid some of the pitfalls of the California UCL and the False Advertising Statute, which have created an overbroad regime that has advertisers and their clients self-censoring protected First Amendment speech in fear of suits being brought by disgruntled consumers.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the California Supreme Court.

Respectfully submitted,

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APPENDIX

The ANA is the industry's premier trade association dedicated exclusively to marketing and brand building. Representing more than 300 companies with 8,000 brands that collectively spend over $100 billion in marketing communications and advertising, the ANA's members market products and services to consumers and businesses. ANA serves the needs of its members by providing marketing and advertising industry leadership in traditional and e-marketing, legislative advocacy, information resources, professional development and industry-wide networking.

The AAF is a national trade association that represents virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. AAF members also include approximately 200 local professional advertising associations with 45,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to advertise and communicate with consumers throughout the United States.

The AAAA, founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 500 members, comprised of large multi-national agencies and hundreds of small and mid-sized agencies, maintain 2,000 offices throughout the country. Together, AAAA member advertising agencies account for nearly 80 percent of all national, regional and local advertising placed by agencies in newspapers, magazines, radio and television in the United States. AAAA is dedicated to the preservation of a robust free market in the communication of commercial and noncommercial ideas.

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

No. 02-575

In The
Supreme Court of the United States

NIKE, INC., ET AL.,
Petitioners,
v.
MARC KASKY
Respondent.

On Writ of Certiorari to the
Supreme Court of California

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AND THE INTERNATIONAL SIGN ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

Are statements that a corporation issues defending its overseas labor practices in response to public criticism fully protected by the Free Speech Clause of the First Amendment?

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ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).....25

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R. James Claus, *Traffic and On-Premise Sign Regulation,* 32 SIGNLINE 1 (Int'l Sign Ass'n) (2002).....10, 27

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BRIEF OF DEFENDERS OF PROPERTY RIGHTS AND THE INTERNATIONAL SIGN ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Defenders of Property Rights and the International Sign Association, *amici curiae,* submit this brief in support of petitioners.[1] See Rule 37.3 of the Rules of this Court. Both parties have consented to the filing of this brief.

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no one other than *amici curiae* contributed financially to the preparation of this brief.

INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a*

Great Oregon, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The International Sign Association (ISA), based in Alexandria, Virginia, represents manufacturers, users, and suppliers of signs and sign products. ISA exists to support, promote and improve the economically vital sign industry. Effective signs are a critical component of a business' success and a valuable information tool. Commercial speech restrictions permitted under the First Amendment often have a significant economic impact on signs and the value of the property on which the signs are located.

STATEMENT OF THE CASE

In response to criticism of its overseas labor practices, Nike issued public statements, including press releases and newspaper advertisements, defending itself. *See Kasky v. Nike*, 45 P.3d 243, 248 (Cal. 2002). Believing some of the statements to be false, California resident Marc Kasky

brought an action seeking monetary and injunctive relief under the private attorney general provision of the state's unfair competition law that prohibits "not only advertising which is false, but advertising, which although true, is either actually misleading or which has a capacity, likelihood, or tendency to deceive or confuse the public." *Kasky*, 45 P.3d at 247-48 (citing CAL. BUS. & PROF. CODE §§ 17500, 17535). The Superior Court and the Court of Appeal found Nike's public statements to be fully protected noncommercial speech under the First Amendment[2] of the federal constitution and article I, section 2 of the California constitution.[3]

The California Supreme Court reversed, holding that the speech at issue was commercial based on consideration of three elements: the speaker, the intended audience, and the content of the message. *See Kasky*, 45 P.3d at 259. Because

[2] U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech"

[3] Cal. Const., art. I, § 2(a): "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse

"the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purposes of promoting sales of its products," that court held, the messages were commercial speech. *See id.* The California Supreme Court created this test out of whole cloth, based on the ambiguity of this Court's commercial speech jurisprudence. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

SUMMARY OF ARGUMENT

For reasons that appeared to be concocted after the conclusion had been reached, numerous cases have held that commercial speech should enjoy less protection under the Free Speech clause of the First Amendment than noncommercial speech. *See Central Hudson Gas & Electric*

of that right. A law may not restrain or abridge liberty of speech or press."

Corp. v. Public Service Comm'n, 447 U.S. 557, 561 (1980) ("The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression"). This distinction, however, has no basis in the text of the Clause. It also has little basis in the Founding Era constitutional commentary. Instead, this "commercial speech" exception to the First Amendment apparently began life as one sentence without citation in a 1942 decision by this Court. *See Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising"). *See also* Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990). This complete exclusion of commercial speech from First Amendment protection lasted until this Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), when it was then given limited First Amendment protection on account of its "commonsense differences" with fully

protected speech. *See Virginia State Board of Pharmacy*, 425 U.S. at 771-72 n.24.

This Court has offered three *post hoc* practical rationales for this lesser protection of commercial speech: the relatively easier verifiability of commercial speech, the greater durability of commercial speech in withstanding the chilling effect of speech restriction, and the prevention of commercial harm. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996); *Virginia State Board of Pharmacy*, 425 U.S. at 771-2 n.24.

These rationales for lesser protection cannot withstand scrutiny. For one, commercial speech is not more easily verifiable. *See* Kozinski, *supra*, at 635 ("The idea that commercial speech is more objective than other forms of speech does not survive the most rudimentary reality check.") For another, the assumption that the profit motivation makes commercial speech hardier defies empirical evidence, as history is replete with examples of

how religious, artistic, and scientific beliefs have driven expression. *See id.* at 637 ("[O]ther interests can be just as strong as economics, sometimes stronger.") Finally, using a commercial speech restriction to combat commercial fraud places the court, not the marketplace of ideas, in the role of arbiter of truth, with no relation to the fraudulent transaction the restriction seeks to prevent.

Even if there were a constitutional mandate to accord commercial speech less protection under the First Amendment, any distinction between commercial and noncommercial speech is unworkable. Economic motives are inherently bound up with all types of expression. *See* Loren A. Smith, Jr., *Allen Chair Symposium 1996: The Future of Environmental and Land-use Regulation: Essay: Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1062-63 ("The desire to make a buck and the desire to write a poem appear very similar.")

Likewise, the profit motive played a leading role in the establishment of our right to freedom of expression. *See* John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 60 (1996) ("Printers [who convinced Parliament to end the licensing system] . . . naturally sought to protect their interests and limit the prerogatives of government [to suppress publication]"). Other forms of expression demonstrate a similarly close relationship between commercial motivations and the resulting expression. *See* Kozinski, *supra*, at 641 (offering example of how music videos serve to promote record sales). A commercial speech test taking into account the profit motive of the speaker, as adopted by the court below, threatens to curb these forms of expression.

Finally, commercial speech restrictions like those allowed by the court below would have a significant economic impact on the sign industry, whose member companies are as much purveyors of First Amendment

expression as are newspaper publishers and television broadcasters. The sign industry posts $30 billion a year in sales and supports our nations $3 trillion-a-year industry. *See* http://www.signs.org/aboutisa/members.htm (last visited February 21, 2003). The signs produced by this industry transmit information commercial and otherwise, playing roles in maintaining economically health areas and improving traffic safety. *See* R. James Claus, *Traffic and On-Premise Sign Regulation*, 32 SIGNLINE 1, 3-4 (Int'l Sign Ass'n) (2002) (citing J.A. CIRILLO, S.K. DIETZ, AND R.L. BEATTY, ANALYSIS AND MODELING OF RELATIONSHIPS BETWEEN ACCIDENTS AND THE GEOMETRIC AND TRAFFIC CHARACTERISTICS OF THE INTERSTATE SYSTEM (Federal Highway Administration 1969)). Commercial speech restrictions would impede the use of advertisements as an informational tool and would severely impact businesses that are dependent on signs to make economic and beneficial use of their property for no good constitutional reason.

ARGUMENT

I. The Exclusion of "Commercial Speech" From Full First Amendment Protection Has No Basis in the Text of the Constitution and Little Basis in Precedent

The origin of the "commercial speech" exclusion from full First Amendment protection appears to spring from a single sentence in a 1942 opinion of this Court: "We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." *See Valentine*, 316 U.S. at 52. This decision was grounded neither upon a textual analysis of the First Amendment nor upon any precedent of this Court.[4]

This Court revisited the issue 34 years later in *Virginia State Board of Pharmacy*:

[4] "The most remarkable aspect of Justice Roberts' opinion, delivered for a unanimous Court, is that it cites no authority. None. Instead, the opinion disposes of the issue in one sentence: 'We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising.' And so was born the commercial speech doctrine. Without citing any cases, without discussing the purposes or values underlying the first amendment, and without even mentioning the first amendment except in stating Chrestensen's contentions, the Court found it clear as day that commercial speech was not protected by the first amendment." Kozinski, *supra*, at 627.

> While the Court in *Virginia State Board of Pharmacy* did extend a significant degree of protection to commercial speech, it refused to cloak such speech with the full regalia of First Amendment protection. As a result, commercial speech advanced to an improved but still uncertain position within the hierarchy of First Amendment categories. In effect, by sandwiching commercial speech between historically unprotected categories (e.g., libel and obscenity) and categories with longer and more distinguished constitutional pedigrees (e.g., political speech), the Court left it in a state of constitutional limbo.

Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681, 681 (1997)

Commercial speech has remained in constitutional limbo ever since *Virginia State Board of Pharmacy*. This Court has held that commercial speech occupies a "subordinate position in the scale of First Amendment values," *see, e.g., Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978), and as such, can be subject to greater restrictions than noncommercial speech. *See Central Hudson*, 447 U.S. at 61 ("The Constitution . . . accords a lesser

protection to commercial speech than to other constitutionally guaranteed expression").

Cast adrift from First Amendment moorings, the court below thought it had distilled from this Court's opinions three reasons for the commercial speech exclusion from full First Amendment protection:

- "First, the truth of commercial speech ... may be *more easily verifiable by its disseminator* than ... news reporting or political commentary..."
- "Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation."
- "Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is 'linked inextricably' to those transactions." *Kasky*, 45 P.3d at 252-53 (citing *44*

Liquormart, Inc., 517 U.S. at 499; *Virginia State Board of Pharmacy*, 425 U.S. at 771-72 fn. 24)

The first two rationales (ease of verifiability and greater hardiness of commercial speech) sound more like responses to criticism than legal or constitutional reasoning. Moreover, as with most broad generalizations about human behavior, they are highly debatable and exceptions readily come to mind. For instance, human rights activists in Vietnam or Thailand may well be better able to verify working conditions at a plant in their country than the Nike executives in Beaverton, Oregon. Nor is all commercial speech factual in nature and subject to verification.[5] Nor is

[5] As one commentator has noted: "First, we question the notion that it is easier to ascertain the truth of commercial speech. Clearly, this is true in some paradigm cases: It is certainly easier to determine the truth of the claim 'Cucumbers cost sixty-nine cents' than the claim 'Republicans will govern more effectively.' But not all commercial speech is so objective. What about the statement 'America is turning 7-Up'? Is that true? How would you tell? What about the claim that Burger King's hamburgers taste better than McDonalds' because they are charbroiled? That begins to sound more like the claim of a political candidate; it's hard to say that its truth can be easily verified.

The objectivity of commercial speech fades even more when we get beyond old-fashioned 'We make a good product' advertising and consider the way advertising is actually practiced today. What about a

objective verifiability a characteristic unique to commercial speech:

> [T]here are many varieties of noncommercial speech that are just as objective as paradigmatic commercial speech and yet receive full first amendment protection. Scientific speech is the most obvious; much scientific expression can easily be labeled true or false, but we would be shocked at the suggestion that it is therefore entitled to a lesser degree of protection. If you want, you can proclaim that the sun revolves around the earth, that the earth is flat, that there is no such thing as nitrogen, that flounder smoke cigars, that you have fused atomic nuclei in your bathtub -- you can spout any nonsense you want, and the government can't stop you.

Kozinski, *supra*, at 635.

Second, the notion that profit is a stronger motivation to speak than, e.g., religious, philosophical or political conviction, contradicts the history of this nation's founding and the sacrifices of our founding fathers themselves.

television commercial that shows a man using a particular brand of deodorant and, as an apparent result, leading a much more vigorous social life? How could we ascertain the truth of that commercial? Does it even have a truth? It is intended to plant the suggestion in the minds of consumers that this deodorant is a desirable product, but surely a purchaser cannot claim to have been defrauded when he fails to acquire a new group of friends. The notion that commercial speech is any more verifiable than noncommercial speech may once have been true, but it ceased to be so when advertising entered the twentieth century." Kozinski, *supra*, at 635.

George Washington and John Adams neglected their farming businesses to serve the revolution, while Benjamin Franklin, James Madison, Thomas Jefferson and the others risked hanging for treason as the price of signing the Declaration of Independence. Pasternak and Solzhenitsyn continued to write, and Shostakovich to compose, under the very real threat of being sent to the Gulag. Humankind throughout the ages has proved that it is not the love of money, but the love of truth and right that appears to be the strongest motivation of our race.[6]

Third, although government may certainly act to prevent commercial fraud, the statute at issue goes much farther, outrunning this rationale for its existence. Mr. Kasky

[6] "History teaches that speech backed by religious feeling can persist in extraordinarily hostile climates; sacred texts survive in places where dire consequences attend their possession, consequences that would easily overcome a mere profit motive. Artistic impulses can also cause expression to persist in the face of hostile government regulation." Kozinski, *supra*, at 637.

does not allege that he was defrauded, or that he would have bought Nike shoes had he believed that the company treated its Asian workers fairly. Had he been able to directly link the statements to a proposed or completed fraudulent transaction, First Amendment protections would certainly not obtain because it is the transaction, not the speech, which is unlawful. By converting the speech itself into the unlawful act, completely divorced from the sale of products or their qualities, the California legislature adopted a statute that is violative of the First Amendment.

CAL. BUS. & PROF. CODE § 17200 makes illegal "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, or untrue or misleading advertising," including false advertising, already prohibited under CAL. BUS. & PROF. CODE § 17500.[7] Through the device of the private attorney general under CAL. BUS. & PROF. CODE §§

[7] The California false advertising law also prohibits "not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *See Kasky*, 45 P.3d at 250.

17204, 17535, Mr. Kasky is able to place before the California courts the abstract question of how Nike's Asian workers are treated, quite independently of any commercial transaction at all. Although it must be admitted that corporate ethics may influence sales, this would not seem to convert the power to prevent consumer fraud into the power to control corporate ethics—let alone what corporations say about their ethics. Let stand, the opinion below would authorize the courts of California to inquire into statements made regarding the marital and sexual mores of Nike's management, their health, church attendance, demeanor, and whether they are good parents—all of which might conceivably affect a consumer's choice of shoes or apparel.

This California statute abandons the marketplace of ideas for the majesty of the courtroom, placing judges in the role of arbiter of the truth. Commercial speech is afforded less protection, apparently because it is too important to be left to the populace. California appears to have decided that the relative merits of laundry detergent or pickup trucks

cannot be left to the consuming public (already armed with the right to sue for fraud), but must be determined by courts even in the absence of any connection to a commercial transaction. By exalting "commercial truth" above political, scientific or artistic truth, California has turned the First Amendment on its head. As one eminent commentator states:

> These cases have made it abundantly clear that no principled line can be drawn between speech directed to making money, and speech directed to espousing a political position. Any rationale that will allow you to suppress one will allow you to suppress the other. First Amendment theory has reluctantly been drawn to this logic. The reluctance has been in large part due to the hostility modern legal theory has borne towards property rights and profit-making. Somehow it was not as acceptable to advertise a soap as to promote a candidate, even if the candidate was "dirty" and the soap was clean. Chief Justice Rehnquist captured the essence of this attitude when he noted in *Dolan v. City of Tigard* that there is "no reason" why one right protected under the Bill of Rights "should be relegated to the status of a poor relation" of other, more frequently cited rights also protected by those constitutional provisions.

Smith, *supra,* at 1062-63.

II. As This Case Demonstrates, the Constitutional Distinction Between Commercial and Noncommercial Speech is Inherently Untenable and Should Be Discarded to Safeguard The Right to Free Speech

Even if there were a supportable distinction between commercial and noncommercial speech under the First Amendment, such a distinction necessarily raises the question of how to distinguish between the two, a question that courts has not been able to definitively answer. This Court has acknowledged the difficulty in fashioning a clear-cut distinction between commercial speech and noncommercial speech. *See Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

The court below based its holding that Nike's public statements were forms of commercial speech on a three-part test it developed on its own, loosely based on a previous three-part test once employed by this Court. See B*olger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67. (1983) (the

combination of three factors—advertising format, product references, and commercial motivation—provided "strong support" for characterizing the speech at issue as commercial speech). The test adopted by the court below required consideration of three elements: the speaker, the intended audience, and the content of the message. *See Kasky*, 45 P.3d at 247. Because "the messages in question were directed by a commercial speaker to a commercial audience, and . . . they made representations of fact about the speaker's own business operations for the purposes of promoting sales of its products," that court held, the messages were commercial speech. *See id.* at 259.

The definition of "commercial speech" announced by the California Supreme Court is circular: under that definition, commercial speech turns out to be anything Nike says. By defining excluded commercial speech as messages from a "commercial speaker" to a "commercial audience" regarding company activities or operations, the court below simply stripped commercial companies of First Amendment

protection.[8] The only way Nike can speak is through its agents who are, by definition, "commercial speakers." The audience of a commercial speaker would appear to be (at least under the definition used by the court below) "commercial," and the subject matter of the message inevitably would deal with the company itself (which makes commercial products). Excluded "commercial speech," as defined by the court below, is thus revealed to be whatever a commercial entity speaks. Should Nike announce a position on virtually any political, scientific or social issue, that position might influence prospective shoe buyers—and confer upon the California courts the ability to determine the veracity of the statement.

The exclusion of "commercial speech" thus undermines the very foundations of free speech. Commercial

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[8] The court below seemed to recognize the impropriety of this result when it stated: "Our dissenting colleagues are correct that the identity of the speaker is usually not a proper consideration in regulating speech that is entitled to First Amendment protection, and that a valid regulation of protected speech may not handicap one side of a public debate." *Kasky*, 45 P.3d at 261.

motivations are invariably and inextricably intertwined with all forms of expression. Many motives, including profit, can prompt expression on any issue, and "human motives cannot be separated by any objective test." *See* Smith, *supra,* at 1062-63.

Indeed, it might properly be said that commercial speech has played a leading role in the establishment of our right to freedom of expression. In 17th and 18th century England, printers faced loss of income when government suppressed publication. *See* McGinnis, *supra,* at 60. Accordingly, the printers relied on property rights arguments in their successful efforts to convince Parliament to end the licensing system and the general warrants by which government seized printed material. *See id.* at 61 ("The notion of information as property came naturally to printers and played a prominent part in their arguments for freedom"). In defending freedom of the press, these Whig printers couched their arguments in the language of economic rights, rightly understanding that economic motives often

drive and enable the dissemination of information on matters political, commercial, and otherwise. *See id.* Accordingly, no court has held that there exists a commercial press exception to the Free Press Clause.

Other forms of expression demonstrate a similarly close relationship between commercial motivations and the resulting expression. *See* Kozinski, *supra*, at 641 (providing example that fully protected music videos promote record sales). Newspapers and broadcast television, the heirs of the aforementioned Whig printers, disseminate information on political affairs with a view to increasing sales, attracting paying advertisers, and generating ratings. In these cases, profit motivation and economic transactions are essential to the transmission of the resulting expression. *See* McGinnis, *supra*, at 91. A commercial speech test taking into account the profit motive threatens to curb these forms of expression.

Some advocates of restricting First Amendment protection to political speech have abandoned this position because of this untenable distinction: "[T]he discovery and

spread of what we regard as political truth is assisted by many forms of speech and writing that are not explicitly political." ROBERT H. BORK, THE TEMPTING OF AMERICA 333 (1990).

It is, in the end, impossible to define "commercial speech" in constitutional terms because the phrase has no constitutional meaning. Commercial speech is so intertwined with all other speech that any definition intended to exclude it from First Amendment protection must fail. The decision that Nike may not freely speak out on a topic of great public importance in which the company is involved cannot stand because the result is inconsistent with bedrock constitutional principles.

III. Commercial Speech Restrictions Allowed Under the California Supreme Court's Test Would Have a Significant Economic Impact on the Sign Industry.

Signs advertise the nature and location of establishments, goods and services—generally commercial ones. Signs are the medium that carries the message of the

"commercial speaker" to the audience. That message may well say "Finest Food in Town," "Have Fun," or "Lowest Prices." Under the decision of the court below, the owners of these signs are subject to suit, and may be required to prove through admissible evidence the validity of their sign's messages.

Like the aforementioned purveyors of First Amendment-protected expression, i.e., newspaper publishers, television news broadcasters, writers, and musicians, sign makers use material property to disseminate information to earn a living. The sign industry, composed of manufacturers and suppliers of on-premise signs and sign products, is a $30 billion a year industry. *See* http://www.signs.org/aboutisa/members.htm (last visited Feb. 21, 2003). The electric sign industry alone reached a record sales volume of $4.6 billion in 1997. *See State of the Industry Report*, SIGNS OF THE TIMES (July 1997). Computer-aided sign makers, another sector of the sign industry, generated an estimated sales volume of $3.6 billion

in 1997. *See The CAS/Commercial State of the Industry Report*, SIGNS OF THE TIMES (1997).

The commercial signs produced by this industry transmit information, and this exchange of information creates the market for the products being advertised. *See* McGinnis, *supra*, at 55. The sign industry thereby supports our nation's $3 trillion-a-year industry. *See* http://www.signs.org/aboutisa/members.htm (last visited Feb. 21, 2003).

Signs play an important role in creating and maintaining economically healthy commercial districts. *See* R. James Claus, *Traffic and On-Premise Sign Regulation*, 32 SIGNLINE 1 (Int'l Sign Ass'n) (2002). Also, commercial signs confer additional non-economic benefits like traffic safety based on their function as a medium of information, benefits that would be put at risk by the Court's lesser protection for commercial speech. *See* Claus, *id.* at 3-4 ("High-rise signs located at high traffic volume intersections increased safety, provided they were conspicuous, . . .legible,

. . . and recognizable") (citing J.A. CIRILLO, S.K. DIETZ, AND R.L. BEATTY, ANALYSIS AND MODELING OF RELATIONSHIPS BETWEEN ACCIDENTS AND THE GEOMETRIC AND TRAFFIC CHARACTERISTICS OF THE INTERSTATE SYSTEM (Federal Highway Administration 1969)). Commercial speech restrictions given a constitutional pass would impede the use of advertisements as an informational tool.

Commercial speech restrictions have an especially significant economic impact on the owners of on-premise signs. Many property owners operating businesses on their property depend on on-premise advertising to make beneficial and productive use of their property. A study conducted between 1995 and 1997 by the University of San Diego on the effects of on-premise signs on the financial performance of retail sites concluded that such signs had a "financially substantive impact on the revenues of a site." *See* THE ECONOMIC CONTEXT OF ON-PREMISE BUSINESS SIGNS AND HOW TO ESTABLISH VALUE IN THE MARKETPLACE 28 (The Signage Found. for Econ. Excellence), *available at*

http://www.signagefoundation.org/economic/economictoc.html (last visited Feb. 21, 2003) (citing *Research on Signage Performance* (Univ. of San Diego School of Bus. Admin. 1997)). Among other things, the study concluded that changes to building signs, whether additions or replacements of signs, increased weekly sales by 5 percent. *See id.* at 30. Also, the addition of small directional signs indicating entrance and exit routes to retail locations increased weekly sales 4 to 12 percent. *See id.* Based on these findings, the study predicted that one additional sign installed on a site would lead to a 4.75 percent increase in annual sales. *See id.* at 29. Signs as a form of commercial speech are an integral economic component of property use.

Commercial speech restrictions thus impinge on the ability of these property owners to make economic use of their property. As this Court has held, "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has

suffered a taking." *See Lucas v. South Carolina Coastal Council*, 507 U.S. 1003, 1018-19 (1992). Lesser protection for commercial speech thus exposes commercial property owners to significant economic risk.

CONCLUSION

For all these reasons, *amici curiae* urge this Court to reverse the decision below.

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Supreme Court, U.S.
FILED
FEB 28 2003

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC. *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF OF EXXONMOBIL, MICROSOFT, MORGAN STANLEY, AND GLAXOSMITHKLINE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a corporation's speech on matters of public concern is entitled to the same level of First Amendment protection as speech on such matters by other speakers.

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OTHER AUTHORITIES

Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 155-56 (4th ed. 1996) 25

Robert L. Stern et al., *Supreme Court Practice* § 18.1, at 814 (8th ed. 2002) 25

INTEREST OF *AMICI*[1]

ExxonMobil is the world's largest private integrated oil company, engaged in oil and gas exploration, production, supply, transportation, and marketing in some 200 countries around the world.

Microsoft is the worldwide leader in software, services, and Internet technologies for personal and business computing.

Morgan Stanley is one of the world's largest diversified financial services companies, providing investment banking, underwriting, sales and trading, investment advisory, asset management, and credit card services to individuals, corporations, governments, and other entities around the world.

GlaxoSmithKline is one of the world's largest pharmaceutical companies. It discovers, develops, and markets prescription drugs and consumer products in the United States and around the world.

Each of these *amici* has a strong interest in vindicating the First Amendment rights threatened by the judgment of the California Supreme Court, and in protecting the availability of relief in this Court in the circumstances presented here.

Each *amicus* does business in California and, accordingly, is potentially subject to civil and criminal liabilities

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[1] The parties have filed with the Clerk of this Court blanket consents to the filing of *amicus* briefs. Pursuant to Rule 37.6, *amici* state that no counsel for a party in this case authored this brief in whole or in part and that no person or entity other than *amici* or its counsel made a monetary contribution to the preparation or submission of this brief.

imposed under Cal. Bus. & Prof. Code § 17200 *et seq.* and § 17500 *et seq.* or similar laws that might be enacted in other states. Like virtually every other large corporate enterprise in the United States, *amici* regularly speak out on issues of public concern and in so doing place before the public facts about their products, services, or business operations and practices. Such issues range from human rights abroad; global climate change; environmental effects of business operations; healthcare reform, including such issues as access to prescription drugs, and healthcare crises such as the AIDS epidemic in Africa; and involvement with controversial foreign governments; to product safety; consumer issues, such as privacy and security; intellectual property rights; equitable treatment of customers; and diversity in the workplace. In some instances, *amici* are responding to criticisms; in others, they are initiating public discussion. Often, they are seeking to advance legislative or regulatory goals. In each such instance, their speech is an effort to engage public opinion on a vital issue of the day.

If a corporation's every press release, letter to an editor, customer mailing, op-ed article, and website posting may, under the California statutes at issue here, be the basis for civil and criminal actions, corporate speakers will find it difficult to address issues of public concern implicating their products, services, or business operations and practices—even to defend themselves in the court of public opinion when attacked.

SUMMARY OF ARGUMENT

1. Nike's speech and speech by corporations on other matters of public concern merit the highest level of First Amendment protection. Amid swirling controversy about globalization and the operations and practices of multinational corporations—an international controversy marked by burning editorials, consumer boycotts, violent demonstrations, and urgent demands for legislative action—Nike was

targeted by activists and portrayed in the news media as typifying multinational corporate misconduct in the Third World. Nike responded to these criticisms and portrayals through editorial advertisements, press releases, letters to the editor, op-ed articles in newspapers, and other established channels of public discussion and debate. The context, form, and content of Nike's speech demonstrate that the company was addressing matters of public concern, where the interests served by the First Amendment are at their zenith. Such speech by a corporation merits the highest level of First Amendment protection and is entitled to the same "breathing space" as speech on matters of public concern by other speakers.

Nike's speech cannot legitimately be classified as "commercial speech." Despite the indefiniteness of *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court has made clear that "commercial speech" is not merely speech that has an economic motivation, but "speech that proposes a commercial transaction." That category of speech is both defined and limited by the governmental interest that justifies special leeway in its regulation: protection of consumers from "commercial harms" incident to a commercial transaction. Such "commercial harms" may arise from false or misleading claims about a product (or the terms and conditions on which it is available) made by a seller in an advertisement for the product, or in the product's labeling; or they may arise from particularly oppressive forms of solicitation. These "commercial harms" are rightly deemed to be sufficiently severe and unavoidable, and the countervailing interests so slight, as to justify a degree of regulation that cannot be tolerated in the realm of political or social debate. A corporation's speech on matters of public concern, including statements about a product's qualities or characteristics or the impacts of a company's operations or practices, presented in established channels of public discussion and debate and not as part of a selling

message in product advertising or product labeling, does not threaten such "commercial harms." The category of "commercial harms" cannot itself be expanded to reach the effects of corporate speech on matters of public concern, presented in such channels of communication, lest speech that lies at the heart of the First Amendment be curtailed.

2. Under *ASARCO Inc.* v. *Kadish*, 490 U.S. 605 (1989), a party in Nike's position has standing to invoke the authority of this Court. The California Supreme Court has construed California law in a manner that exposes Nike and other corporate speakers to potential civil and criminal liability for engaging in core First Amendment speech. As a result, Nike must now defend its past speech in a lawsuit that the First Amendment forbids, and its future speech (and that of other corporate speakers) is gravely chilled. Each of these effects causes Nike "direct, specific, and concrete injury," *id.* at 623-24, thus entitling Nike to invoke the authority of this Court under Article III. For a party in Nike's position, sued in state court by a plaintiff lacking Article III standing, under a state statute that the state's highest court has sustained against the party's federal constitutional challenge, the only federal remedy is in this Court.

ARGUMENT

I. A CORPORATION'S SPEECH ON MATTERS OF PUBLIC CONCERN MERITS THE HIGHEST LEVEL OF FIRST AMENDMENT PROTECTION.

The question presented in this case is whether a corporation's speech on matters of public concern is entitled to the same level of First Amendment protection as speech on such matters by other speakers. *Amici* submit that the answer to this question must be "yes."

It is axiomatic that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values" and is entitled to special protection. *NAACP* v. *Claiborne*

Hardware Co., 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980)). Such speech lies "at the heart of the First Amendment's protection," *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 776 (1978), because "free and open debate" on matters of public concern is "vital to informed decision-making by the electorate," *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 571-72 (1968), and is "the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964). See also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (debate on matters of public concern must be "uninhibited, robust, and wide-open").

To provide "breathing space," *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767, 778 (1986) (quoting *New York Times*, 376 U.S. at 272 (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963))), for true speech on matters of public concern, "the Court has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,'" *Philadelphia Newspapers*, 475 U.S. at 778 (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). The First Amendment does not tolerate strict liability for false speech on matters of public concern and places heavy burdens on those who would hold a speaker liable for erroneous statements in addressing such matters.

As discussed below, Nike's speech plainly addressed matters of public concern, and a corporation's speech on such matters is entitled to the same "breathing space" as the speech of others.

A. Nike's Speech Plainly Addressed Matters of Public Concern.

"Whether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . ." *Connick* v. *Myers*, 461 U.S. 138, 147-48

(1983). An examination of each of these factors shows that Nike's speech in defense of its labor practices was plainly speech on a matter of public concern.

Context. The communications to which the company was responding provide the "context" of Nike's speech. Those communications demonstrate that, at least in the eyes of some, the labor practices of multinational corporations in developing countries, and Nike's labor practices in Asia in particular, have become "one of the major public issues of our time." *New York Times*, 376 U.S. at 271. Indeed, for a number of activists, Nike's labor practices in Asia provide a case study of human-rights abuses by multinational companies with international diplomatic ramifications. Thus, for example, the Hong Kong Christian Industrial Committee stated in a report criticizing the labor practices of Nike and other shoe companies in China:

> As leading international corporations, multinational sports shoe companies should play a positive role in improving human rights in China. They should become an example for others to follow.
>
> This is what President Bill Clinton promised when he de-linked the granting of Most Favoured Nation status from human rights in China. Mr. Clinton insisted that US capital can have a positive effect on the development of human rights in China, but we have yet to see these positive results.

Petitioner's Lodging 96, 117 (First Amended Complaint, Exh. C, *Working Conditions in the Sports Shoe Industry in China*). Another rights group characterized its report criticizing Nike's operations in Indonesia as "a case study of the industry as a whole." *Id.* at 242 (Exh. X, Community Aid Abroad, Briefing Paper, *Sweating for Nike: Labour Conditions in the Sports Shoe Industry*). See also *id.* at 127 (Exh. E, Vietnam Labor Watch report); *id.* at 232 (Exh. W, Boycott Nike, *Fact Sheet*).

The news media have also treated the issue as one of public concern. A CBS "48 Hours" broadcast featured Nike's operations in Vietnam as exemplifying attempts by multinational corporations to exploit "cheap labor" overseas. "The signs are everywhere," the correspondent intoned, "of an American invasion in search of cheap labor. Millions of people who are literate, disciplined and desperate for jobs." *Id.* at 131 (Exh. F). Nike's labor practices have also been the subject of a front-page story in *The New York Times*, see *id.* at 144 (Exh. H, Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*), and the subject of a columnist's crusade, see *id.* at 146 (Bob Herbert, *Nike's Boot Camps*); *id.* at 147 (Bob Herbert, *Brutality in Vietnam*); *id.* at 148 (Bob Herbert, *Trampled Dreams*); *id.* at 149 (Bob Herbert, *Nike's Bad Neighborhood*); *id.* at 150 (Bob Herbert, *Nike's Pyramid Scheme*), and were cited in another *Times* story as a case study of exploitation, see *id.* at 151 (Edward A. Gargan, *An Indonesian Asset Is Also a Liability*).

Content and Form. Nike's own speech, responding to its critics and various news media stories, addressed the same public issue; and the channels through which the company responded were the established channels of discussion and debate on matters of public concern. The company responded to questions from the news media, sent letters to the editor and other interested parties, and issued press releases and corporate policy statements. See, *e.g.*, *id.* at 121 (Exh. D, letter to YWCA official); *id.* at 138-39 (Exh. F, answers to questions by CBS reporter); *id.* at 183 (Exh. P, media statement); *id.* at 187 (Exh. Q, letter to critic); *id.* at 190 (Exh. R, letter to athletic directors); *id.* at 193 (Exh. S, letter to editor); *id.* at 198 (Exh. U, explanation of Nike Code of Conduct); *id.* at 201 (Exh. V, Nike Production Primer); *id.* at 265 (Exh. Y, remarks by CEO at shareholders' meeting); *id.* at 270 (Exh. Z, press release, *Nike Responds to Sweatshop Allegations*); *id.* at 285

(Exh. DD, letter to editor responding to critical op-ed article by paper's columnist); *id.* at 307 (Exh. FF, advertisement announcing Young report's conclusion); *id.* at 322 (Exh. II, press release, *Nike Addresses Concerns Regarding Women's Issues and Highlights Leadership in Worker Initiatives*). Cf. *New York Times*, 376 U.S. at 266 ("The publication here was not a 'commercial' in the sense in which the word was used in *Chrestensen*.").

In short, judged by its context, content, and form, Nike's speech addressed matters of public concern.

B. A Corporation's Speech on Matters of Public Concern Requires the Same "Breathing Space" as Speech by Other Speakers.

A corporation's speech on matters of public concern requires "breathing space" for the same reason that such speech by other speakers requires "breathing space," and because any other rule would violate the principles of speaker equality and viewpoint neutrality.

1. The Court has recognized that "the erroneous statement of fact is not worthy of constitutional protection" but "is nevertheless inevitable in free debate," and that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press." *Gertz*, 418 U.S. at 340. Thus, to provide the necessary "breathing space" for speech on matters of public concern, "the Court has been willing to insulate even demonstrably false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation," *Philadelphia Newspapers*, 475 U.S. at 778.

This recognition that the First Amendment requires "breathing space" in discussion of public issues is not a special rule created for libel and defamation actions. The safeguards established by the Court in such actions simply apply the more general principle that "the government

cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified." *Id.* at 777 (citing *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980); *First Nat'l Bank*, 435 U.S. at 786; *Renton* v. *Playtime Theaters, Inc.*, 475 U.S. 41, 47-54 (1986)). As the Court has stated:

> [T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. . . . Because such a "chilling" effect would be antithetical to the First Amendment's protection of speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free."

Philadelphia Newspapers, 475 U.S. at 777 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)).

The "breathing space" afforded speech on matters of public concern is required for speech by corporate speakers no less than for other speakers, even when the speech concerns their own practices, operations, and products. Like any other speaker, a corporation may be expected to make only those statements of fact that it believes to be true. But whether a particular statement of fact is "true" is often a matter of legitimate dispute. Often there are two sides to a story: a corporation's critics may credit one account, the corporation may credit another. Whether a statement of fact is considered to be "true" may also depend on a host of

other factors—for example, the subsidiary facts that one considers to be relevant; how one defines one's terms; what point or frame of reference one uses; whether a statement can be "true" if it is generally true even though counterexamples may exist, or is true as far as it goes even though it does not include facts that someone considers relevant. Moreover, whether a statement is really a statement of fact or instead a statement of opinion, or possibly a figure of speech, may be an issue. Each of the factual "misrepresentations" that Respondent attributes to Nike fall into one or more of these categories.[2]

The point is not that the "truth" of factual statements on matters of public concern is always unknowable. The point is that agreement on whether a statement is "true" is not

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[2] The first and second causes of action asserted by Respondent attribute seven "misrepresentations" to Nike. (See First Amended Complaint ¶¶ 75, 79.) These specified "misrepresentations" are not actually statements alleged to have been made by Nike but Respondent's characterization of Nike's positions on various issues. Four of the seven do not involve statements of fact: two state legal conclusions—that Nike's products are made in accordance with applicable laws and regulations (*id.* ¶¶ 75(b), (c); 79(b), (c)), and two state opinions—that a particular report "proves that NIKE is doing a good job and operating morally" (*id.* ¶¶ 75(f); 79(f)) and that "NIKE guarantees a 'living wage' for all workers who make NIKE products" (*id.* ¶¶ 75(g), 79(g)). The other three are broad statements that raise one or more of the issues described in text above. Moreover, to decide whether Respondent's allegations with respect to Nike's operations and practices were true—the predicate for deciding whether Nike's responses were themselves false—a court would have to determine myriad factual issues concerning events that allegedly occurred half-way around the world. It is difficult to imagine how any court could manage the issues of proof involved in placing a company's worldwide operations and practices on trial.

inevitable and often entails a series of choices made in good faith by speakers as well as listeners. The First Amendment itself affords speakers persuasive license in expressing what they regard to be the truth, see *New York Times*, 376 U.S. at 271-73—license that critics of corporate operations and practices are not characteristically shy about using. Even assuming that a corporate speaker like Nike could fairly be presumed to know everything that has ever happened at each of the 736 facilities located in the 51 countries in which 500,000 workers are used by its subcontractors to manufacture its products (Pet. 2), the notion that the company would be able to make factual statements that *someone* could not assert to be false or misleading in an action under Cal. Bus. & Prof. Code § 17200 *et seq.* and § 17500 *et seq.*, based on the considerations identified above, is fanciful.

It is therefore no answer to say, as the California Supreme Court said, that the "profit motive" (Pet. 12a), or greater "access to the truth" (*id.*), will prevent corporate speech on matters of public concern from being "chilled" if corporations are denied the "breathing space" afforded other speakers when addressing matters of public concern. As the Court stated in *New York Times*, 376 U.S. at 279:

> Even courts accepting [the defense of truth] as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It

is inconsistent with the First and Fourteenth Amendments.

If a corporate speaker must limit its factual statements on matters of public concern to statements that no one could possibly challenge, or that the speaker could be certain it could prove as "true" in a court of law or before a regulatory body, the result will be "a deterrence of speech which the Constitution makes free." *Speiser*, 357 U.S. at 526. See also *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 50, 52-53 (1971) (plurality opinion); cf. *First National Bank*, 435 U.S. at 785 n.21 (noting chilling effect of statute prohibiting corporate speech on ballot measures except on subjects "materially affecting" a corporation's business or property).

2. Denying corporate speech on matters of public concern the same "breathing space" as speech by other speakers would violate the principles of speaker equality and viewpoint neutrality.

In *First National Bank*, 435 U.S. 765, the Court rejected the proposition that the value of speech can be made to depend on the identity of the speaker: "The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777; see also *id.* at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Pacific Gas & Elec.* v. *Pub. Util. Comm'n*, 475 U.S. 1, 8 (1986) ("critical considerations" are not the speaker's identity but "that the State [seeks] to abridge speech that the First Amendment protects, and that such prohibitions limit[ ] the range of information to which the public is exposed").

The Court in *First National Bank* thereby applied in the context of corporate speech one of the most fundamental principles of First Amendment jurisprudence, the principle of speaker neutrality. Simply stated, "government regulation may not favor one speaker over another." *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). See also *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 193-94 (1999); *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Consol. Edison*, 447 U.S. at 533-34; *Carey*, 447 U.S. at 459-63; *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression."); *Wieman* v. *Updegraf*, 344 U.S. 183, 193 (1952) (Black, J., concurring) ("We must have freedom of speech for all or we will in the long run have it for none but the cringing and craven.").

A rule denying corporate speech on matters of public concern "breathing space" would violate this principle of speaker neutrality, and "[t]he effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times*, 376 U.S. at 266 (quoting *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)).

The Court has also stated that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Indeed, "[t]he principle of viewpoint neutrality . . . underlies the First Amendment." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828 (citing

Turner Broad. Sys., Inc. v. *FCC*, 512 U.S. 622, 641-43 (1994)).

> In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity."

Denver Area Telecom. Consortium, Inc. v. *FCC*, 518 U.S. 727, 782-83 (1996) (Kennedy and Ginsburg, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Cohen* v. *California*, 403 U.S. 15, 24 (1971)). See also *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993); *Leathers* v. *Medlock*, 499 U.S. 439 (1991); *Pacific Gas*, 475 U.S. at 11-12; *Consol. Edison*, 447 U.S. at 537.

The prohibition against viewpoint discrimination precludes a rule under which a corporate speaker's critics, but not the corporate speaker, is afforded "breathing space" in speech addressing matters of public concern. For the rule "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992). When the government thus limits the means by which a corporation may "participate in the public debate on . . . controversial issues of national interest and importance," it favors speech of the corporation's critics and thereby "strikes at the heart of the freedom to speak." *Consol. Edison*, 447 U.S. at 535.

C. The Governmental Interest that Justifies Commercial Speech Regulation Does Not Justify Such Regulation of Corporate Speech on Matters of Public Concern.

A corporation's speech cannot both address matters of public concern and yet be regulable as "commercial speech." If the speech addresses matters of public concern, it is entitled to the highest level of First Amendment protection and must be afforded "breathing space." But if the speech is regulable as "commercial speech," the government may intervene on an adequate record to ensure its truthfulness, apply a "strict liability" regime, and impose other forms of regulation—including prescreening and affirmative disclosure requirements, see *Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.12 (1976)—that are not tolerated in the realm of fully protected speech. Speech on matters of public concern cannot be made subject to such a regime because such speech does not threaten the type of "commercial harms" that justify that regime in the realm of commercial speech.

Notwithstanding the indefiniteness of *Bolger*, the Court has made clear that "commercial speech" is not merely economically motivated speech, but "speech proposing a commercial transaction."[3] Although "speech proposing a

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[3] The Court has stated that commercial speech is speech that informs consumers about "who is producing and selling what product, for what reason, and at what price," *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 496 (1996) (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 765), "a communication that does no more than propose a commercial transaction," *Thompson* v. *W. States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002) (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993)); *see also Lorillard Tobacco*

(continued)

commercial transaction" receives "lesser protection than other constitutionally guaranteed expression," *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422 (1993), this is not because such speech is less important or less valuable than other protected expression. On the contrary, as the Court has recognized, a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate," *Thompson* v. *W. States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002) (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 763), and the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system [and] . . . to the formation of intelligent opinions as to how that system ought to be regulated or altered," *Va. State Bd. of Pharm.*, 425 U.S. at 765. See also *Florida Bar* v. *Went For It, Inc.*,

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Co. v. *Reilly*, 533 U.S. 525, 554 (2001) (Commercial speech is "speech proposing a commercial transaction.") (quoting *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557 (1980)); *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001) ("[C]ommercial speech [is] usually defined as speech that does no more than propose a commercial transaction."); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) ("[P]roposal of a commercial transaction [is] '*the test*' for identifying commercial speech.") (quoting *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989)). This is the type of expression—"I will sell you the X prescription drug at the Y price"—for which the commercial speech doctrine was devised. *Va. State Bd. of Pharm.*, 425 U.S. at 761; *see also Bates* v. *State Bar*, 433 U.S. 350, 364 (1977) (Commercial speech "inform[s] the public of the availability, nature, and prices of products and services."); *44 Liquormart*, 517 U.S. at 496 (opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.) ("[A]dvertising provides consumers with accurate information about the availability of goods and services.").

515 U.S. 618, 636 (1995) (Kennedy, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting) ("The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures."). Even if the Court had not recognized the importance and value of commercial speech, the government could not treat such speech as less worthy than other protected expression, for "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *W. States*, 122 S. Ct. at 1503 (quoting *Edenfield* v. *Fane*, 501 U.S. 761, 767 (1993)).[4]

What justifies greater regulation of commercial speech than of other protected expression is not the lesser value of this speech but the government's interest in preventing "commercial harms." See *Discovery Network*, 507 U.S. at 426. "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart,*

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[4] The Court's statement that commercial speech occupies a "subordinate position in the scale of First Amendment values," e.g., *Went For It*, 515 U.S. at 623 (citation omitted), is difficult to reconcile with the Court's other statements affirming the importance and value of such speech and the rule against governmental determinations regarding the worth of speech, see *Lorillard*, 533 U.S. at 575 (Thomas, J. concurring in part and concurring in judgment) (reiterating view that "there is no 'philosophical or historical basis for asserting that "commercial" speech is of "lower value" than "noncommercial" speech'") (citation omitted); *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring in part and concurring in judgment) (observing that Court's references to the "subordinate position" of commercial speech have been "without clear rationale").

Inc. v. *Rhode Island*, 517 U.S. 484, 502 (1996) (opinion of Stevens, J.) (quoting *Discovery Network*, 507 U.S. at 426).[5]

Such "commercial harms" are threatened when a seller makes false or misleading claims about a product or service, or the terms on which it is offered for sale, in a communication proposing a sale. The resulting injury can be severe and unavoidable: "Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised." *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring in judgment). In discussing these harms, Justice Stevens has noted the "immediate harmful impact" that a false product claim can cause when made at point of sale, where consumers "may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled." *Id.* See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 457 n.13 (1978) ("The immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others."). It is the government's interest in preventing false or misleading claims threatening such injuries, in communications proposing a sale, that justifies special leeway in the regulation of commercial speech.[6]

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[5] See also *Lorillard*, 533 U.S. at 576 (Thomas, J. concurring in part and concurring in judgment) (government's leeway in regulating commercial speech "is limited to the peculiarly *commercial* harms that commercial speech can threaten—*i.e.*, the risk of deceptive or misleading advertising"); *Bolger*, 463 U.S. at 81 (Stevens, J., concurring in judgment) ("The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful . . . .").

[6] The Court has also held that particularly oppressive modes of solicitation can be a source of "commercial harm." See *Ohralik*, (continued)

Only when a corporation's statements are presented as a part of a corporation's selling message in a product advertisement or on a product label can the government's interest in preventing "commercial harms" arguably justify a degree of regulation not permitted for speech by other speakers. By contrast, when presented in established channels of public discussion and debate, such as those used by Nike here, a corporate speaker's statements on matters of public concern—including statements concerning the qualities or characteristics of a product, or the impacts of the company's business operations or practices—should receive the same level of First Amendment protection as statements concerning such matters by other speakers. Society's interest in "uninhibited, robust, and wide-open" debate on matters of public concern, *New York Times*, 376 U.S. at 270, and the principles of viewpoint neutrality and speaker equality, require no less. See *supra* pp. 12-14.[7]

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436 U.S. at 447 (in-person solicitation); *Went For It*, 515 U.S. 618 (targeted direct-mail solicitation); see also *Shapero* v. *Ky. Bar Ass'n*, 486 U.S. 466, 474-77 (1988); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985). In several cases, the Court has appeared to accept the legitimacy of regulating commercial speech for purposes other than preventing such "commercial harms" (*i.e.*, those threatened by false or misleading advertising or particularly oppressive modes of solicitation). But in only one case since *Virginia Board* has the Court upheld a commercial speech restriction that was not justified to prevent such harms. The Court upheld such a restriction in *Posadas de Puerto Rico Associates* v. *Tourism Co.*, 478 U.S. 328 (1986), on the basis of a paternalistic rationale that it has since repudiated. See *W. States*, 122 S. Ct. at 1507-08; *44 Liquormart*, 517 U.S. at 510 (opinion of Stevens, J.); *id.* at 518 (Thomas, J., concurring in judgment).

[7] To the extent that a "selling message" is deemed to be implicit in whatever a corporation may say on matters of public concern, (continued)

As discussed, Nike's speech was core First Amendment speech addressing matters of public concern. The only "harm" that the company's claims could be said to threaten if those claims were determined to be "false" (but see *supra* pp. 9-11) would be that some consumers might have been led to view the company more favorably than they might otherwise have viewed it and, as a result, might have decided to purchase the company's products when they otherwise might not have done so.[8] This "harm" will result, moreover, only if these consumers are not dissuaded by further speech by the company's critics. The opportunity for response available to a corporation's critics when the corporation speaks through established channels of public discussion and debate disables the government from placing special restrictions on the corporation's speech. In such a circumstance, the admonition that "the fitting remedy for evil counsels is good ones" (*Whitney* v. *California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)) applies. See *Ohralik*, 436 U.S. at 457. "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment]." *Abrams* v. *United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J. dissenting).

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even in established channels of policy and political discussion and debate, that commercial aspect is "inextricably intertwined" with the corporation's "fully protected speech" and thus the entirety of the speech must be classified as noncommercial. *Riley* v. *Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 796 (1988).

[8] Cf. *Lorillard*, 533 U.S. at 580 (Thomas, J., concurring in part and concurring in judgment) (rejecting argument "that an indirect solicitation is enough to empower the State to regulate speech") (citing *Gitlow* v. *New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement . . . .")).

In sum, any "harm" from a company's speech on matters of public concern is not so severe or unavoidable, or the countervailing First Amendment interest in providing "breathing space" so slight, as to justify subjecting such speech to the regime of regulation applicable to commercial speech.[9] Applying the commercial speech regime to a corporation's statements on matters of public concern would drastically curtail valuable speech on vital issues of the day. "Society as a whole then would be the loser." *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984).

II. UNDER *ASARCO*, A PARTY IN NIKE'S POSITION HAS STANDING TO INVOKE THE AUTHORITY OF THIS COURT.

A. Nike Satisfies the Article III Requirements for Standing.

A party has standing to invoke the authority of a federal court under Article III if the party can show injury-in-fact, causation, and redressability. *Vt. Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). A party in Nike's position satisfies these requirements.

This Court has long recognized its Article III jurisdiction in the circumstances presented here:

> When a state supreme court denies the existence of a federal right and rests its decision on that basis, this Court unquestionably has jurisdiction to review the federal issue decided by the state court. To suggest

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[9] That such "harm" is insufficient to justify special regulatory leeway is confirmed by the fact that the commercial speech regime is not, and would never be, applied to those whose "false" statements of fact on matters of public concern *discourage* consumers from purchasing a company's products, even though the "harm" would be the same.

> otherwise would contradict principles laid down in the Judiciary Act of 1789 . . . and settled since *Martin* v. *Hunter's Lessee*[.]

Quinn v. *Millsap*, 491 U.S. 95, 104 (1989); see also, *e.g.*, *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 262 (1933) (finding Article III jurisdiction where, as here, "valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the [federal court's] decision of the question of law," and "[t]he relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the [state law]").

A corporation like Nike has an interest, protected by the First Amendment, in speaking on matters of public concern. See, *e.g.*, *Consol. Edison*, 447 U.S. at 530 (advocacy of nuclear power); *First Nat'l Bank*, 435 U.S. at 765 (opposition to tax initiative); *Thomas* v. *Collins*, 323 U.S. 516 (1945) (union solicitation); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940) (labor picketing); cf. *Pacific Gas*, 475 U.S. 1 (plurality opinion). That First Amendment interest is threatened by the two California statutes construed by the California Supreme Court in this case, under which Nike may now be subject to civil and criminal liability for engaging in such speech.[10]

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[10] The California Supreme Court's judgment operates as a definitive construction of state law, which "fixes the meaning of the statute," *Winters* v. *New York*, 333 U.S. 507, 514 (1948), and puts "words in the statute as definitively as if it had been so amended by the legislature," *Wainwright* v. *Stone*, 414 U.S. 21, 23 (1973) (per curiam) (quoting *Winters*, 333 U.S. at 514). Its judgment constitutes "the words of the statute." *Button*, 371 U.S. at 432.

The California statutes cause Nike injury-in-fact by forcing the company to defend its past speech in an ongoing lawsuit that the First Amendment forbids, and by chilling the company's future speech through the threat of more such forbidden lawsuits. The threat of liability for engaging in protected speech constitutes both actual and threatened injury sufficiently distinct and palpable to support federal court standing. A decision by this Court invalidating the California statutes as so construed would redress this injury.

This Court has "avoided making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Id.* Moreover, the Court has repeatedly recognized that the *threat* of litigation constitutes a cognizable injury in the First Amendment context:

> It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to "steer far wider of the unlawful zone" thereby keeping protected discussion from public cognizance.

Rosenbloom, 403 U.S. at 52-53 (plurality opinion) (quoting *Speiser*, 357 U.S. at 526 (1958)); see also, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 521 (1972) ("[P]ersons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression."); *Smith* v. *California*, 361 U.S. 147, 150-52 (1959) (recognizing chilling effect of strict-liability rules on speech). The very existence of a statute that "does not aim specifically at evils within the allowable area of State

control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech. . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill*, 310 U.S. at 97-98; see also *id.* at 97 ("It is not merely the sporadic abuse of power . . . but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

The chilling effect of the California court's decision exists now and "each passing day may constitute a separate and cognizable infringement of the First Amendment," *Nebraska Press Assoc.* v. *Stuart*, 423 U.S. 1327, 1329 (1975) (opinion of Blackmun, J.) (in chambers), sufficient to give rise to an injury in fact. See also *Nebraska Press Assoc.* v. *Stuart*, 423 U.S. 1319, 1325 (1975) (opinion of Blackmun, J.) (in chambers) (delaying review "would constitute and aggravate a deprival of . . . [First Amendment] rights, if any, that the [petitioners] possess and may properly assert"). As the Court has recognized:

> [where] uncertainty of the constitutional validity of [a state statute] restricts the present exercise of First Amendment rights. . . . it would be intolerable to leave unanswered . . . an important question . . . under the First Amendment; an uneasy and unsettled constitutional posture of [the challenged state statute] could only further harm the operation of a free press.

Miami Herald Publ'g Co. v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974).

B. *ASARCO* Confirms the Standing of a Party in Nike's Position.

Under *ASARCO*, 490 U.S. 605, a party in Nike's position has standing to invoke the authority of this Court. Like the petitioners in *ASARCO*, Nike seeks invalidation of a state

supreme court's decision on a federal question, in a case in which petitioners were the original defendants, and in which the state courts took no account of Article III standing rules as applied to the respondent. Like the judgment of the Arizona Supreme Court in *ASARCO*, the judgment of the California Supreme Court here "causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case." *Id.* at 612. See Robert L. Stern et al., *Supreme Court Practice* § 18.1, at 814 (8th ed. 2002) ("[A] party who seeks entry into the federal court system for the first time must be able to satisfy the Article III standing requirements *at that point.*") (citing *ASARCO*) (emphasis added); Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 155-56 (4th ed. 1996) (same).

In *ASARCO*, plaintiffs (individual taxpayers and an educational association) obtained a declaration from a state supreme court that a state law governing mineral leases was void under federal law. 490 U.S. at 610. The state court "took no account" of the plaintiffs' "federal standing." *Id.* at 617. This Court concluded, however, that the petitioners—defendants in the state court action—had standing to challenge the state supreme court's judgment in this Court, because they alleged a "specific injury stemming from the state-court decree, a decree which rests on principles of federal law." *Id.* Noting that "it is petitioners, the defendants in the case and the losing parties below, who bring the case here and thus seek entry to the federal courts for the first time in the lawsuit," the Court held that "petitioners have standing . . . and that this dispute now presents a justiciable case or controversy." *Id.* at 618.

The petitioners in *ASARCO* contended that (1) "the [state] Supreme Court's decision rest[ed] on an erroneous interpretation of federal" law, (2) the judgment "secured by respondents, along with the relief that may flow from that

ruling, [was] invalid under federal law," and (3) if this Court were to agree with petitioners, "reversal of the decision below would remove its disabling effects upon them." *Id.* at 618-19. The Court in *ASARCO* cited these circumstances as sufficient to "meet each prong of the constitutional standing requirements." *Id.* at 619. The same circumstances are present here. In light of the direct and immediate injury to Nike caused by the California court's judgment, particularly its chilling effect on core First Amendment speech, the Court will be deciding the questions presented not "in the rarified atmosphere of a debating society," *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982), but in the crucible of an Article III case or controversy.

A federal court unquestionably would have had Article III jurisdiction to entertain a declaratory judgment action seeking invalidation of the California statutes, if the statutes had been enacted as the California Supreme Court has construed them. See 28 U.S.C. § 2201; 42 U.S.C. § 1983; see, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 458-59, 475 (1974) (threat of enforcement sufficient under Article III to permit petitioner's challenge to state law allegedly conflicting with First Amendment); *Wooley* v. *Maynard*, 430 U.S. 705, 709-10 (1977) (where threat of enforcement exists, petitioner may seek federal court declaration that state statute violates First Amendment rights). But for the *Rooker-Feldman* doctrine, a party in Nike's position could challenge the California statutes in a federal declaratory judgment action even now. See *ASARCO*, 490 U.S. at 622-23 (doctrine bars direct review in lower federal courts of a decision reached by the highest state court). The fact that a federal district court would have jurisdiction to hear such a challenge confirms that Nike may assert its First Amendment challenge here. But because the *Rooker-Feldman* doctrine would bar Nike from bringing such an action, and

because the California court's judgment causes Nike present injury, Nike's *only* federal remedy is in this Court.

CONCLUSION

The judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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February 28, 2003

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE BUSINESS ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Buckley v. *Valeo*, 424 U.S. 1 (1976) 21
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Tex. Rev. Civ. Stat. Ann., art. 5221f-1, § 5(a)	13

OTHER AUTHORITIES

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Press Release, Am. Council for an Energy-Efficient Econ., Bush-Cheney Energy Plan Misses the Mark on Energy Efficiency (May 17, 2001), *available at* http://www.aceee.org/press/enrgypln.htm	12
N. Bendavid, *Battle Lines Drawn Over Energy Plan: Increased Drilling Sharpens Debate*, Chi. Trib., May 4, 2001	12
The Business Roundtable, *50 State Reports on Effect of Trade with China* (Apr. 21, 2000), *available at* http://www.brt.org	11
The Business Roundtable, *Beyond the Balance Sheet: How U.S. Companies Bring Positive Change to Latin America* (Aug. 2, 2001), *available at* http://www.brt.org	11
The Business Roundtable, *BRT Supports The Teacher Protection Act of 2001* (May 2, 2001), *available at* http://www.brtable.org/issue.cfm/10/0/0/540	11
The Business Roundtable, *Consumer Protection and Quality in the Health Care Industry* (Sept. 10, 1997), *available at* http://www.brt.org	11
The Business Roundtable, *Corporate Social Responsibility in China: Practices by U.S. Companies* (Feb. 16, 2000), *available at* http://www.brt.org	11
The Business Roundtable, *Financial Impact of the No Child Left Behind Act on the State of New Hampshire* (Feb. 19, 2003), *available at* http://www.brtable.org/issue.cfm/3/0/0/49	11
The Business Roundtable, *Immigration Report* (Dec. 2, 2002), *available at* http://www.brtable.org/issue.cfm/3/0/0/49	11

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The Business Roundtable, *K-12 Education Reform* (Feb. 7, 2001), *available at* http://www.brtable.org/issue.cfm/3/0/0/49 11

The Business Roundtable, *Principles for the Design of an Emissions-Credit Trading System for Greenhouse Gases* (Jun. 1, 1999), *available at* http://www.brt.org/issue.cfm/4 11

The Business Roundtable, *Principles for Retirement Savings Reform* (Mar. 27, 2002), *available at* http://www.brt.org 11

The Business Roundtable, *Re: Release No. 33-8514, Strengthening the Commission's Requirements Regarding Auditor Independence, File No. S7-49-02* (Jan. 13, 2003), *available at* http://www.brt.org 11

The Business Roundtable, *Unleashing Innovation: The Right Approach to Global Climate Change* (Apr. 4, 2001), *available at* http://www.brt.org/ issue.cfm/4 11

SCHOLARLY AUTHORITIES

K. Auletta, *World War 3.0: Microsoft v. the U.S. Government and the Battle to Rule the Digital Age* (2001) 12

J. Beatty, *Introduction: "Of a Huge and Unknown Greatness," in Colossus: How the Corporation Changed America* (J. Beatty ed., 2001) 9

B. Bailyn, *The Ideological Origins of the American Revolution* (1967) 7

C. Beard, *An Economic Interpretation of the Constitution* (The Free Press 1986) (1913) 7, 8

E. Countryman, *The American Revolution* (1985) 6

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A. Gawer & M. Cusumano, *Platform Leadership: How Intel, Microsoft and Cisco Drive Industry Innovation* (2002) 12

A. Innes, *From Corporation to Commonwealth, in Colossus: How the Corporation Changed America* (J. Beatty ed., 2001) 9

P. Maier, *The Revolutionary Origins of the American Corporation*, 50 Wm. & Mary Q. 51 (1993) 9

R. Middlekauff, *The Glorious Cause: The American Revolution 1763-1789* (1982) 6, 7

E. Morgan, *The Birth of the Republic, 1763-89* (3d ed. 1992) 8

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A. Schlesinger, *The Colonial Merchants and the American Revolution 1763-1776* (Atheneum 1968) (1917) 7

2 A. de Tocqueville, *Democracy in America* (P. Bradley ed., 1948) (1835) 25

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae The Business Roundtable is an association of approximately 150 chief executive officers of leading corporations with a combined workforce of more than ten million employees in the United States and about $3.7 trillion in revenues. The executives who created The Business Roundtable believed that the U.S. economy would be healthier, there would be less unwarranted intrusion by government into business affairs, and the interest of the public would be better served if there were more cooperation and less antagonism among various sectors of society. They concluded that one way business could be a more constructive force and have a greater impact on government policymaking was to bring the chief executive officers more directly into public debate. The Business Roundtable was founded in the belief that the business sector in a pluralistic society should play an active and effective role in the formation of public policy.

The Business Roundtable's member chief executives actively participate in public policy debates, in California and throughout the nation, and seek to advance policies that foster vigorous economic growth and a dynamic global economy, for the benefit of corporations and consumers alike. The Roundtable has a strong interest in protecting the ability of corporations to participate in robust debate on matters of public concern.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its members, and its counsel made a monetary contribution to the preparation of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The California Supreme Court incorrectly relegated corporate speech on matters of public policy to a lower level of First Amendment protection than that afforded to other speech on the same issues. Commercial actors have in fact provided unusually valuable contributions to the most important public debates when – and especially when – addressing issues that bear directly on their own economic interests. From the Stamp Act to the debate over the structure and ratification of the Constitution, many of the most prominent contributors to the founding generation's debates were "self-interested" commercial actors who addressed matters directly affecting their commercial interests. That pattern replicated itself over the following generations, and business leaders today provide unique and important contributions to a broad range of public policy issues that directly affect their commercial interests – including issues surrounding technology, international trade, fiscal and energy policy, education, the workforce, health, retirement, the environment, and corporate governance. American public policy debate would be less informed, less balanced, and less robust if commercially "self-interested" speech were accorded second-class status, readily subjected to liability, and inhibited as a result.

The First Amendment protects the right of commercial actors to participate fully in debates on matters of public concern. That protection is determined by the nature of such speech, not by the (corporate) status of the entity or the (economic) motivation of the speaker. The California Supreme Court failed to make the proper determination here because it mechanically concluded that Nike's public defense of its manufacturing and employment practices amounted to no more than selling sneakers. By providing only the limited protections of the "commercial speech" doctrine to *one side* of a debate on important policy issues, the court below significantly diminishes the vitality of that debate.

When a commercial actor makes statements concerning its business operations as a part of a public policy debate, the state's interest in protecting consumers from harm resulting from false or misleading statements is not properly advanced by restrictions on corporate speech like those at issue here. Instead, the vigorous counter-speech of advocacy groups, reporters, and politicians will aggressively counter the corporate statements. Indeed, consumers themselves can be expected to recognize the self-interested component of corporate speech and discount it accordingly.

In light of the limited state interest, and the concomitant First Amendment interest in fostering robust public debate, the state cannot impose liability for a commercial actor's speech on a matter of public concern in the absence of proof of commercial harm caused by such speech and proof of actual malice. At a minimum, the First Amendment precludes imposition of liability under a strict liability standard for such speech. Otherwise, the public will be deprived of corporate perspectives on matters of social concern, and corporations will be denied the right to compete effectively with advocacy groups and other non-governmental organizations in the policy arena. Indeed, if the California Supreme Court's view of corporate speech were to prevail – and corporations were inhibited from speaking freely on public issues of concern to them – the people would lose an important counter-weight to the power of government, and the constitutional system of democratic and political checks and balances would suffer commensurately.

ARGUMENT

This case arises from the speech of petitioners Nike, Inc., and five of its officers or directors, commercial actors drawn by criticism of Nike's labor practices to participate in the broader public debate on globalization and its impact on social welfare. Accused by advocacy groups of exploiting workers in developing countries, and alleged to exemplify

harms wrought by globalization, Nike responded with public statements defending its treatment of workers and its effect on local economies. The question presented here is whether that corporate "counter-speech" receives the full First Amendment protection traditionally afforded speech in public debate.

The California Supreme Court erroneously held that it does not. Disregarding the fact that petitioners' speech – the subject of intense media scrutiny, investigative reports, and op-ed pieces – was an integral part of a public debate, the court discounted that speech primarily because the corporation is, at bottom, commercially motivated. The court pointed to the combination of three factors that reduced the First Amendment value of petitioners' speech – the commercial identity of the speaker; the intended audience of actual and potential consumers; and the fact that speech about business operations may influence consumer's purchasing decisions. App. at 21a-23a. The court ultimately concluded, "when a corporation, *to maintain and increase its sales and profits*, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech" that is entitled to lesser First Amendment protection. *Id.* at 29a (emphasis added).

But the fact that a commercial actor may speak in furtherance of its own economic interests does not disqualify its speech from the full protection of the First Amendment. The constitutional guarantee of free speech does not tolerate favorites based on the status or motivation of the speaker; one of its fundamental purposes is to protect "the public's interest in receiving information," *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 8 (1986), from a broad array of sources, including for-profit corporations and other commercial entities. Indeed, as this Court has recognized, to hold otherwise would mean that most newspapers and books lack full First Amendment protection because their publishers (and authors) want to make money. See, *e.g.*, *New York*

Times v. *Sullivan*, 376 U.S. 254, 266 (1964). As our nation's historical and contemporary practices make clear, speakers engaged in commerce, advancing facts and ideas that promote their economic self-interest, have long made, and continue to make, valuable contributions to debate on matters of public concern. See *infra*, Part I. Valuing those practices, this Court's precedents establish that the First Amendment fully protects speech on matters of public interest, regardless of the identity of the speaker or the motivation for the speech. See *infra*, Part II.

I. SPEAKERS ADVOCATING THEIR ECONOMIC SELF-INTEREST HAVE LONG MADE, AND CONTINUE TO MAKE, VALUABLE CONTRIBUTIONS TO DEBATE ON MATTERS OF PUBLIC CONCERN.

A. There Is A Long And Venerable History And Tradition In The United States Of Self-Interested Commercial Actors Participating In, And Indeed Leading, Public Debate.

A brief survey of the most influential speech that shaped our nation's early politics and institutions shows the value of public policy debate by self-interested commercial actors addressing matters that directly affect their commercial interests. Far from forming a peripheral or less valued form of speech, as the California Supreme Court concluded in applying the "commercial speech" doctrine, this type of commercially motivated speech in fact has often formed the core of public discourse that our First Amendment traditions most value. At critical junctures in our nation's history, commercial speakers advancing ideological and philosophical claims linked to their commercial self-interest have been among the most influential, not least valuable, of political speakers.

Many of the events leading to our nation's declaration of independence, and the accompanying focus of public debate,

struck directly at the economic interests of important commercial interests in the colonies. The Proclamation of 1763 limited landholders' ability to extend their property holdings west of the Appalachians. The Stamp Act of 1765 taxed commercial and land transactions. The Townshend Act of 1767 taxed principal trading goods, including glass, lead, and, of course, tea. The institutional opposition to British policies, and the increasing self-identification of the colonists as having independent political interests, arose in Boston and Virginia, major trading ports, and elsewhere in large measure in response to these economic restrictions.[2] Indeed, included among the "long train of abuses and usurpations" enumerated in the Declaration of Independence were "cutting off our Trade with all parts of the world" and "imposing Taxes on us without our Consent." *Declaration of Independence*, para. 2 (U.S. 1776).

Speakers reflecting and defending their own commercial interests most directly affected by these British efforts were essential participants in the resulting political debate. Colonists communicated and debated the implications of these measures through an outpouring of pamphlets and broadsides – a tradition that came to encompass *The Federalist Papers* and other commentary on the Constitution. Unlike in eighteenth century England and the United States today, there were few professional editorialists. Instead, the leading editorialists were individuals drawn from the commercial and professional classes.

> The American pamphleteers were almost to a man lawyers, ministers, merchants, or planters heavily engaged in their regular occupations. . . . [U]ntil the crisis of Anglo-American affairs was reached, they had had no occasion to turn out public letters, tracts, and pamphlets in numbers at all comparable to those of the English pamphleteers.[3]

[2] *See* R. Middlekauff, *The Glorious Cause: The American Revolution 1763-1789*, at 118-207 (1982); E. Countryman, *The American Revolution* 41-73 (1985).

Similarly, the events leading to the Constitutional Convention and informing the debates over ratification of the Constitution also threatened the economic interests of important speakers of the time. Shays' Rebellion of 1786-1787 and its threat to order and creditors' rights, together with the Rhode Island paper currency crisis, added urgency to the Convention and served as a backdrop to the ratification debates.[4] Speculation in banking and public securities associated with the States' debt was widespread, and any resolution of that issue, including the eventual assumption of debt by the Federal Government, would directly affect the commercial interests of many of the most outspoken commentators on those subjects.

Many of the most prominent contributors to the political debate of the revolutionary and constitutional periods were associated with commercial interests directly at stake in the debates and events of the time. Included in the Continental Congress and the Constitutional Convention were many landholders, successful merchants, security-holders, and professionals.[5] Those people – who had a variety of commercial interests – contributed in significant part to the debates over the nation's foundation.

[3] B. Bailyn, *The Ideological Origins of the American Revolution* 13-14 (1967); *see also* A. Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776* (Atheneum 1968) (1917).

[4] *See* Middlekauff, *supra* note 2, at 600-01, 627-28; J. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* 360-99 (1979).

[5] *See generally* F. McDonald, *We the People: The Economic Origins of the Constitution* 73-151 (The Free Press 1986) (1958); C. Beard, *An Economic Interpretation of the Constitution* 38-92 (Transaction Publishers 1992) (1913).

Historians have debated the extent to which, but not the fact that, economic considerations shaped the positions of the principal speakers of the day and the members of the Continental Congress and Constitutional Convention. Whether the Constitution was "an economic document drawn with superb skill by men whose property interests were directly at stake,"[6] or "economic elements were obviously of considerable importance" but manifested themselves in complex and indirect ways,[7] historians generally agree that commercial considerations during the Founding period were inseparable from statements of genuinely held political and ideological views. As one historian has explained, the fact that the colonists' positions may have been "designed simply to further their own economic interests" is unremarkable: "We will see no incongruity in their coupling of principle and self-interest if we remember that constitutional principles have been created and continue to exist for the protection of the people who live under them." E. Morgan, *The Birth of the Republic, 1763-1789*, at 51-52 (3d ed. 1992).

This pattern of "self-interested" commercial speakers addressing and shaping important political issues that directly concern their commercial interests is repeated in major political debates throughout the nation's history. In the 1830s to 1850s, many of the great issues of the day – the creation of the Bank of the United States and tariff policy – revolved around commercial interests, and were debated in large measure by creditors, manufacturers, and traders. From 1885 to 1905, prominent political issues included monetary and credit policies, particularly as they affected agrarian interests, and the emerging industrial economic structure, especially as it affected wages and working conditions. Among the most "self-interested" speakers were the leaders of the farm and labor movements, who, in addressing their commercial

[6] Beard, *supra* note 5, at 188.

[7] McDonald, *supra* note 5, at 358 (refuting Beard thesis).

interests, were essential to the political debates of the period. In the New Deal era during the 1930s, the robust debate that informed and shaped the more expansive government initiatives would have been inconceivable without the participation of the affected commercial interests, especially major corporations and their leaders. All these participants addressing major political issues were self-interested speakers engaged in what the California Supreme Court characterized as lesser protected "commercial speech." Judged by the standards of the First Amendment, however, they are political speakers engaged in "core" protected speech.

Finally, individuals have long participated in discussion on public affairs as members and leaders of corporations *per se*. The first significant commercial corporations in the new nation, the Massachusetts Bay Company and the Virginia Company, not only served as the vehicles for settling two leading colonies, but also provided the mechanism for the new colonists to debate and develop the political institutions that proved so important to the emerging nation.[8] The debates and experiments in collective action during the Revolution formed the basis for the subsequent development of the corporate form,[9] and the corporation became an important mechanism for organizing and coordinating a variety of endeavors in the following decades, including the infrastructure projects that were often a subject of public controversy in the Nineteenth Century.

Toward the end of that century, the railroad corporations became a principal source of political controversy, and their leaders and their opponents debated a broad range of public

[8] *See* J. Beatty, *Introduction: "Of a Huge and Unknown Greatness," in Colossus: How the Corporation Changed America* 3 (J. Beatty ed., 2001) ("*Colossus*"); A. Innes, *From Corporation to Commonwealth, in Colossus* 17.

[9] P. Maier, *The Revolutionary Origins of the American Corporation*, 50 Wm. & Mary Q. 51 (1993).

issues that shaped the nation. The Court had by this time recognized the corporation's role in coordinating its members' activities and protecting their interests, through recognition that the Fourteenth Amendment's protection of "persons" extended to protection of the activities of corporations. See, *e.g.*, *Chicago, Milwaukee & St. Paul Ry.* v. *Minnesota*, 134 U.S. 418, 456-59 (1890). Corporations thereafter increasingly became the vehicle to organize non-profit activities as well as commercial activities, and in both forms continued to receive the Court's protection when their members used them to engage in activities protected by the Constitution. See *infra* pp. 16-17. Our nation's historical tradition and practices thus confirm that the public advocacy of interests, including commercial interests, through the corporate form provides no basis for reduced First Amendment protection.

B. Public Policy Debates Today Continue To Benefit From The Contributions Of Commercially Motivated Speakers.

Contemporary debates on public policy issues confirm the continuing importance of contributions from "self-interested" commercial actors. As the social entities that are the subject of many laws and regulations, businesses play a critical role in informing public debate on the implications and effects of particular policy choices. Put another way, "[business] corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pacific Gas & Elec.*, 475 U.S. at 8 (quoting *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978)). Indeed, for many issues of public concern, meaningful debate would be impossible without active participation by commercial leaders, who often necessarily have direct economic interests in the debate's outcome.

Commercial entities and their leaders contribute to a wide range of public policy debates, and often their most important

contributions address how a policy would affect their own business's processes, products, or economic interests – even when their speech arises from a concern for the public interest. Issue analyses and policy recommendations by task forces of The Business Roundtable illustrate the breadth of these contributions. For example, business leaders have unique insights into fiscal policy as it affects the economy, and education as its affects workforces.[10] Debates surrounding international trade, corporate governance, or health and retirement would be impoverished without the active contributions and perspectives of business leaders.[11] Business leaders are active participants in public policy debates surrounding security issues, environmental regulation, and civil justice reform,[12] and their contributions are often valuable because of – not despite – those leaders' elaboration of the commercial interests at stake.

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[10] The Business Roundtable, for example, has issued the following reports, *Financial Impact of the No Child Left Behind Act on the State of New Hampshire* (Feb. 19, 2003), *Immigration Report* (Dec. 2, 2002), and *K-12 Education Reform* (Feb. 7, 2001), all of which are available at http://www.brtable.org/issue.cfm/3/0/0/49.

[11] Relevant reports issued by The Business Roundtable include *Corporate Social Responsibility in China: Practices by U.S. Companies* (Feb. 16, 2000); *Beyond the Balance Sheet: How U.S. Companies Bring Positive Change to Latin America* (Aug. 2, 2001); *50 State Reports on Effect of Trade with China* (Apr. 21, 2000); *Re: Release No. 33-8514, Strengthening the Commission's Requirements Regarding Auditor Independence, File No. S7-49-02* (Jan. 13, 2003); *Consumer Protection and Quality in the Health Care Industry* (Sept. 10, 1997); and *Principles for Retirement Savings Reform* (Mar. 27, 2002), all of which are available at http://www.brt.org.

[12] The Business Roundtable, for instance, issued a public statement, *BRT Supports the Teacher Protection Act of 2001* (May 2, 2001), *available at* http://www.brtable.org/issue.cfm/10/0/0/540, and a variety of reports on the environment, including *Unleashing Innovation: The Right Approach to Global Climate Change* (Apr. 4, 2001) and *Principles for the Design of an Emissions-Credit Trading System for Greenhouse Gases* (Jun. 1, 1999). *See* http://www.brt.org/issue.cfm/4.

Debate addressing technology and the digital economy provides an example of how business leaders' contributions are essential to public policy formulation. The leaders of Sun Microsystems, Microsoft, Intel, AOL Time Warner, and Cisco Systems have widely divergent views on technology and related market issues but each has contributed to raising, shaping, and informing enormously varied and important public policy issues, ranging from investment incentives to privacy, public access, and market regulation. See, *e.g.*, K. Auletta, *World War 3.0: Microsoft v. the U.S. Government and the Battle to Rule the Digital Age* (2001); A. Gawer & M. Cusumano, *Platform Leadership: How Intel, Microsoft and Cisco Drive Industry Innovation* (2002). Not coincidentally, those issues also directly affect those corporations' economic interests and concern their products and processes.

Debates involving national energy policy, for example, have also benefited from the multiple and often competing perspectives advanced by "self-interested" commercial speakers. Shortly after the announcement of the current Administration's proposed national energy plan, a broad array of business groups formed the "Alliance for Energy and Economic Growth" and began using mass mailings, Internet postings, and talk radio to generate public support for the plan. See N. Bendavid, *Battle Lines Drawn Over Energy Plan: Increased Drilling Sharpens Debate*, Chi. Trib., May 4, 2001, at 1. Another group, the American Council for an Energy-Efficient Economy, which is funded in part by corporations including Allied Signal, Inc., Boeing Company, and Maytag Corporation, employed similar means to criticize the President's plan for not doing enough to encourage energy-efficient technologies. See Press Release, Am. Council for an Energy-Efficient Econ., Bush-Cheney Energy Plan Misses the Mark on Energy Efficiency (May 17, 2001), *available at* http://www.aceee.org/press/enrgypln.htm. In participating in that robust debate, companies advanced competing factual claims about, among other things, the costs

and feasibility of using energy-saving technologies in performing their business operations.

The numerous federal and state statutes that encourage or even mandate the involvement of business interests in the development of government policies and programs formally recognize the value of contributions to public debate by self-interested commercial actors. In establishing negotiating objectives and bargaining positions for international trade agreements, for example, the President is required to consult with representatives of both the non-Federal government sector and the private sector. See 19 U.S.C. § 2155(a)(1). Similarly, to determine the most effective means of sharing technology developed by the government with the private sector, federal law directs the Federal Laboratory Consortium for Technology Transfer to "seek advice" from, among others, "representatives of . . . large and small business." See 15 U.S.C. § 3710(e)(1)(J).[13]

As they have throughout our nation's history, "self-interested" commercial speakers thus continue to shape and inform a broad range of public policy issues. The value of their contributions often arises precisely because directly affected economic interests inform their views. Cf. *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21 (1974) ("personal stake" necessary for purposes of standing so that party can adequately represent a view and thereby assist court's consideration of an issue). The California Supreme Court's opinion, by contrast,

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[13] Many similar state statutes exist. *See, e.g.*, California Hazardous Waste Source Reduction and Management Review Act of 1989, Cal. Health & Safety Code § 25244.15.1(a) (establishing a committee including, among others, "[t]wo representatives of industry," and "[o]ne representative of small business"); Tex. Rev. Civ. Stat. Ann., art. 5221f-1, § 5(a) (creating an industrial building code council consisting of twelve members, including three to represent the housing and building industries, three to represent general contractors, and three to represent professionals associated with the building trade).

underprotects, and hence threatens to chill, that speech because of the commercial interest and expertise that so often enhance "core" First Amendment debate.[14]

II. THE FULL PROTECTION OF THE FIRST AMENDMENT EXTENDS TO SPEECH BY COMMERCIAL ACTORS ON MATTERS OF PUBLIC CONCERN, INCLUDING MATTERS IN WHICH THEY HAVE AN ECONOMIC SELF-INTEREST.

The decision below mechanically assumed that any factual representations by a commercial entity about its products, services, or business operations that are made for the purpose of advancing the entity's commercial self-interest are disqualified from the full protection of the First Amendment. But debate on matters of public concern is core First Amendment speech, and remains so even when the speaker is

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[14] The California Supreme Court repeatedly dismissed any concerns about the danger of "chilling" the speech of commercial entities by relying on *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976), and *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring in part and concurring in the judgment), for the proposition that the desire for economic profit reduces the likelihood of chilling. *See* App. at 20a, 22a, 27a, 29a. Yet those cases concerned the potential chill on traditional price and brand advertising. In numerous other contexts, this Court has acknowledged the significant risk that, notwithstanding their economic motivation to speak, commercial entities that face potential liability will have their speech chilled. *See, e.g.*, *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 52 (1988) (rule imposing strict liability on commercial publisher for "false factual assertions would have an undoubted 'chilling' effect"); *Sullivan*, 376 U.S. at 278-79 (same); *see also First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 782 n.18 (1978) (lack of clear standards associated with criminal liability for certain speech may lead business corporations to restrain from engaging in even legally permissible speech); *Smith* v. *California*, 361 U.S. 147, 153-54 (1959) (risk of criminal liability for sale of obscene writings will lead commercial bookseller to self-censor and his "timidity" in the face of strict liability will lead him to discontinue selling both obscene and non-obscene writing).

a commercially motivated actor joining a public debate over its own business practices. Treating the speech at issue in this case as core First Amendment speech ensures the breathing space essential to robust public debate. At the same time, such treatment is more than adequate to protect those consumers whose purchasing decisions might be influenced by that speech.

A. The First Amendment Indisputably Protects The Right Of Commercial Actors To Participate Fully In Debate On Matters Of Public Concern.

Speech on "'matters of public concern'" is "at the heart of the First Amendment's protection." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978) (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 101 (1940)). That speech embraces "'all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,'" *id.* (quoting *Thornhill*, 310 U.S. at 102) – which can include, of course, information about a company's labor practices. See *Thornhill*, 310 U.S. at 103 (emphasizing the constitutional guarantee of free discussion about "the practices in a single factory [which] may have economic repercussions upon a whole region and affect widespread systems of marketing"). Because "speech on public issues occupies the '"highest rung of the hierarchy of First Amendment values,"'" it "is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey* v. *Brown*, 447 U.S. 455, 467 (1980))).

As the Court has made clear on several occasions, the fact that speech may be made for commercial purposes does not thereby diminish the protection accorded that speech. See *Ginzburg* v. *United States*, 383 U.S. 463, 474 (1966) ("[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."). In *New York Times* v. *Sullivan*, 376 U.S. 254

(1964), for example, the Court rejected the contention that speech that was part of a "paid, 'commercial' advertisement" necessarily fell outside the protection of the First Amendment. *Id.* at 265. By its very nature, the speech at issue "communicated information," "expressed opinion," and addressed "grievances" and "claimed abuses" – traits that apply to the speech at issue in this case – and was therefore entitled to full First Amendment protection. *Id.* at 265-66. That an advertisement's publication may have been motivated by financial gain was "immaterial" for First Amendment purposes, the Court explained, as is the fact that publishing newspapers and books is also commercially motivated. *Id.* at 266 (citing, *inter alia*, *Smith* v. *California*, 361 U.S. 147, 150 (1959) (protecting First Amendment rights of booksellers)); see also *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) ("[E]conomic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged.").

The Court's holding in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), confirms that basic principle. There, the Court held that a publicity campaign by a group of railroad companies that sought to influence legislation and law enforcement practices did not violate the Sherman Act. See *id.* at 145. The fact that the railroad companies may have sought to destroy their business competitors, the Court emphasized, did not alter that analysis. If the Sherman Act were to prohibit such activity, the Court made clear, it would raise "important constitutional questions." *Id.* at 138.

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id. at 139.

This Court has further established that the commercial identity of a speaker does not diminish the level of protection afforded its speech. See *Bellotti*, 435 U.S. at 777; *Pacific Gas & Elec.*, 475 U.S. at 8. In *Bellotti*, this Court held unconstitutional a state statute prohibiting business corporations from making any expenditures for the purpose of influencing any voter referenda except those that materially affect the property, business, or assets of the corporation. See *Bellotti*, 435 U.S. at 767, 795. In emphasizing the First Amendment's purpose of protecting the public's interest in receiving information, the Court made clear that the identity of the speaker was irrelevant: "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. Speech that is otherwise entitled to the full protection of the First Amendment does not "lose[] that protection simply because its source is a corporation." *Id.* at 784.

Accordingly, neither the fact that a speaker is motivated by economic self-interest nor the fact that the speaker is engaged in commerce affects the appropriate level of First Amendment protection afforded particular speech. Instead, the nature of the speech matters, and it is well-established that speech on matters of public concern receives the First Amendment's full protection. Thus, when commercial entities participate in debate on matters of public concern, the First Amendment fully protects their speech, even when it is made to promote the speaker's commercial self-interest.

B. The Fact That A Commercial Actor's Speech On Matters Of Public Concern Includes Discussion Of The Actor's Own Business Operations Does Not Reduce The Level Of Protection Afforded That Speech.

1. The "commercial speech" doctrine is inapplicable to speech on matters of public concern. That doctrine emerged because this Court concluded that traditional advertising of products and services – previously thought to be outside the reach of the First Amendment – is entitled to constitutional protection. In effect overruling *Valentine* v. *Chrestensen*, 316 U.S. 52, 54-55 (1942), which held that commercial advertising lacks any First Amendment protection, the Court recognized in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-65 (1976), and in numerous subsequent cases that such speech provides valuable information to the public and thus falls within the domain of constitutionally protected speech. See, *e.g.*, *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1503 (2002); *Rubin*, 514 U.S. at 481-82; *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). In light of the government's legitimate interest in regulating the commercial transactions themselves and, in particular, in protecting consumers from fraudulent, or potentially fraudulent, business practices, the Court has also recognized that the government has greater power to regulate "commercial speech" than many other forms of speech. See, *e.g.*, *Bolger* v. *Youngs Drug Prod. Corp.*, 463 U.S. 60, 64-65 (1983); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 426 (1993).

This Court has never suggested, however, that the lesser protection afforded "commercial speech" applies whenever a commercial actor speaks about its own business operations, even when those operations have themselves become the subject of intense public debate and concern. The

commercial speech doctrine evolved in order to heighten protection for speech proposing consumer transactions that had previously been thought to merit no protection. *Virginia Bd.*, 425 U.S. at 762-65. The doctrine was never intended to limit protections for speech that has always been recognized as fully protected by the First Amendment simply because the speaker is commercially motivated.

2. When a business labels its products or engages in traditional advertising about the price or performance of a product or service, the state has a strong and legitimate interest in protecting consumers against false or inherently misleading statements. By contrast, when a commercial entity participates in debate on public policy issues and makes representations about its business operations, and is not directly or principally proposing a sales transaction, the state's interest in protecting consumers from commercial harms is significantly diminished. Whereas, in the former context, the state may go so far as to prohibit all false or deceptive statements, see *id.* at 771-72, in the latter context, the First Amendment's full protections apply and necessarily preclude the imposition of strict liability, or liability on the basis of mere negligence, for false and misleading statements. See *infra* pp. 22-24.

The state's interest in protecting consumers from commercial harms is most important when commercial actors make false claims about their products or services in the course of proposing transactions and individuals lack the information or sophistication to evaluate those claims. See *In re R.M.J.*, 455 U.S. 191, 200 (1982); *Bates* v. *State Bar*, 433 U.S. 350, 383 (1977). "Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy." *Rubin*, 514 U.S. at 496 (Stevens, J., concurring). The need for the government to take steps to

ensure that commercial actors speak truthfully is particularly important in that context.

In contrast, when a commercial actor participates in debate on a matter of public concern and is not directly proposing a commercial transaction to consumers, the state's interest in protecting consumers from harm resulting from false claims is considerably diminished. There, counter-speech is likely to inform and protect those consumers whose purchasing decisions might otherwise be influenced by such claims. Given this built-in protection, the state's interest in ensuring the truthfulness of claims made as part of a public debate over a company's business operations does not outweigh the First Amendment interest in ensuring ample latitude for public debate, free from the chilling effect of potential liability for mere argumentative errors or excesses, and the accompanying burdens of defending against those claims. See *supra* note 14. In such circumstances, the state cannot, consistent with the First Amendment, impose liability on commercial actors for their speech without proof of commercial harm caused by the falsehood, and proof of actual malice. At a minimum, the First Amendment interests at stake preclude any imposition of damages under a strict liability standard for a commercial entity's statement in the course of public debate that does not directly propose a commercial transaction.

In this case and for public policy debates generally, counter-speech, rather than damages liability, provides more than adequate protection against the possibility that any false or misleading claims made as part of a public debate will influence the purchasing decisions of some consumers. Cf. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) (state interest in compensating individuals for defamatory falsehoods less strong when opportunities for counter-speech can be expected). As Justice Harlan has explained, "[F]alsehood is more easily tolerated where public attention creates the strong likelihood of a competition among ideas."

Time, Inc. v. *Hill*, 385 U.S. 374, 407 (1967) (Harlan, J., concurring in part and dissenting in part).

In contexts like this one, powerful counter-speech may be presumed. Critics and activists who have questioned or attacked a company's business operations are certain to respond to potential misstatements by refuting the misstatements with additional facts, or information or opinion, or by conducting or demanding further inquiry on the issue. Organizations such as the media are likely to publicize the competing claims or to undertake additional investigation to assess those claims.[15] Indeed, that is precisely what took place in this case. See App. at 3a. Consumers who would decline to purchase products on moral or political grounds linked to the company's operations are, as well, particularly likely to discount the company's claims as self-interested. California does not need to derogate and inhibit that speech through an expanded "commercial speech" doctrine. Especially when a company's practices have been challenged, those consumers can recognize the company's economic self-interest and take that factor into account when evaluating the company's claims. Cf. *Bellotti*, 435 U.S. at 791-92 & n.32 (noting that listeners may take speaker's identity into account when evaluating messages); *Buckley* v. *Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (same).

Where, as here, a company's business operations have themselves become the subject ot intense public policy debate, there is simply no concern that an advertiser is seeking to immunize false or misleading product information from government regulation "simply by including references to public issues," *Bolger*, 463 U.S. at 68. In this case, the company has been drawn into public debate by others and is

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[15] *See* Brief *Amici Curiae* of Thirty-Two Leading Newspapers, Magazines, Broadcasters, and Media-Related Professional Associations In Support of Petition for a Writ of Certiorari at 12-17, *Nike, Inc.* v. *Kasky*, No. 02-575 (U.S. 2002) (arguing that media will investigate contested claims about business operations and did so in this case).

defending its own practices. Petitioners are clearly responding to organized, widely publicized attacks by advocacy groups and non-governmental organizations, and there is no reasonable argument that the company is merely alluding to public issues to secure heightened protection for its product advertising or promotion.

In contexts in which companies are participating in public debate about deeply contested social and political issues, claims that a company might make about its business operations are thus likely to be the subject of speech and counter-speech. In those circumstances, the First Amendment presumes that the "marketplace of ideas" will best ensure that truth will emerge. See *Consolidated Edison Co. of New York, Inc.* v. *Public Serv. Comm'n*, 447 U.S. 530, 534 (1980) ("'[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.'" (quoting *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))). To permit the government to burden the speech of commercial entities in public debate – as California did here – violates the basic constitutional principle that "the people in our democracy," and not the government, "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791; see also *Sullivan*, 376 U.S. at 270 ("The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" (quoting *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.))).

3. Because "erroneous statement is inevitable in free debate," this Court has repeatedly made clear, "it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive'" *Sullivan*, 376 U.S. at 271-72 (alteration and citation omitted); see also *Gertz*, 418 U.S. at 341 ("[W]e protect some falsehood in order to protect speech that matters"). Yet society need not

tolerate calculated falsehoods. See *Time, Inc.*, 385 U.S. at 389 ("[T]he constitutional guarantees [for speech and press] can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function."). The conclusion that the speech at issue here does not constitute "commercial speech" and is entitled to the full protection of the First Amendment does not mean that the state lacks all power to prevent intentional misrepresentations.

This Court's exposition of the First Amendment limits on damages for defamatory falsehoods is particularly instructive here. There, imposing damages liability for speech requires accommodating the competing state interest in compensating individuals for harm to their reputation and the First Amendment interest in protecting that speech. See *Gertz*, 418 U.S. at 341-44; *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 (1985). When discussion addresses matters of public concern, the speech is at the heart of the First Amendment and is entitled to special protection, *Dun & Bradstreet, Inc.*, 472 U.S. at 759, and thus speakers may not be held strictly liable for defamation. See *Gertz*, 418 U.S. at 347; *Sullivan*, 376 U.S. at 279-80.

The appropriate standard of liability for defamatory falsehoods also turns on whether the allegedly defamed individual participates in the public arena or not. The state interest in compensating public figures and officials for harm to their reputation is less important than the state interest in so compensating private individuals in part because of the greater access of public figures and officials to channels of communication and their concomitant ability "to contradict the lie or correct the error." *Gertz*, 418 U.S. at 344. In light of that difference, among others, the Court has held that a public figure or official may not recover damages for defamation unless he or she proves, with clear and convincing proof, that the statement was made with "'actual malice,'" or, in other words, "with knowledge that it was false or with reckless disregard of whether it was false or not," see

Sullivan, 376 U.S. at 279-80; *Associated Press* v. *Walker*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result) (four additional Justices joining in the Chief Justice's position on this issue). A private individual, by contrast, may recover actual damages upon a showing of negligence (or a higher standard of liability), but may not recover presumed or punitive damages absent a showing of "actual malice." See *Gertz*, 418 U.S. at 347.

Here, the balance in favor of First Amendment interests is at least equivalent to that involving libel damages for public figures or officials. In both cases, matters of public concern are involved, and thus the First Amendment interest in protecting speech is at its greatest. The state's interest in preventing commercial harms caused by false statements made as part of a public policy debate about a company's business operations is certainly no greater than the state's interest in protecting against harm to the reputation of public figures, an interest that is adequately protected by the actual malice standard. With the full participation of advocacy groups and the media, the marketplace of ideas is particularly able to redress any commercial harms that are alleged to stem from public policy debates. Because the value of the speech is so great and the state's interest is more limited, the clear and convincing actual malice standard should be added to the First Amendment protections linked to proof of harm and causation. At a minimum, the state may not, consistent with the First Amendment, hold commercial entities strictly liable for false representations about their business operations in the context of public debate.

4. Finally, in the marketplace of ideas, commercial entities frequently vie with editorialists, public advocacy groups, and other non-governmental entities to compete for the hearts and minds of the public concerning issues that affect the entities' economic interests. It would violate the First Amendment's prohibition on viewpoint discrimination for the government to permit one side of public debate – the

commercial actor's critics – to engage in full, wide-open, and robust debate while subjecting the commercial actor to a different and more restrictive standard of conduct for speech. See *R.A.V.* v. *City of St. Paul, Minn.*, 505 U.S. 377, 383-84 (1992); *Bellotti*, 435 U.S. at 785-86. By "rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994) (internal quotation marks omitted), such regulation would harm not only the commercial speaker, but also the public itself.

Corporations are, in fact, similarly situated to other non-governmental organizations in that they all play a crucial role in civil society, promoting what de Tocqueville called America's "circulation of ideas." 2 A. de Tocqueville, *Democracy in America* 109 (P. Bradley ed., 1948) (1835); see also *Pacific Gas & Elec.*, 475 U.S. at 8 ("Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas.'" (quoting *Bellotti*, 435 U.S. at 783)). Eliminating, or even muffling, the voice of corporations "is either to augment that always dominant power of government or to impoverish the public debate." *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 694 (1990) (Scalia, J., dissenting).

According to the California Supreme Court, a private attorney general may hold a commercial entity strictly liable for making false or misleading statements about its products, services, or business operations in public debate, see App. at 5a, 29a-30a; by contrast, a non-commercial entity propounding false or misleading statements about those same products, services, or business operations may not be held strictly liable by anyone. As this regime "give[s] one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Bellotti*, 435 U.S. at 785-86 (footnote omitted).

CONCLUSION

The judgment below should be reversed.

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February 28, 2003

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

No. 02-575

In the

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, AND NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. When a corporation participates in a public debate—writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance—may it be subjected to liability for factual inaccuracies on the theory that its statements are "commercial speech" because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions?

2. Even assuming the California Supreme Court properly characterized such statements as "commercial speech," does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?

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Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 2

EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) 2

TABLE OF AUTHORITIES—Continued

Page

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ... 9

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) ... 7

Ford Motor Co. v. Tex. Dep't of Transportation, 264 F.3d 493 (5th Cir. 2001) ... 23

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) ... 6

Hornell Brewing Co., Inc. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993) ... 16

Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893 (D.C. Cir.1984) ... 8

Licata & Co., Inc. v. Goldberg, 812 F. Supp. 403 (S.D.N.Y. 1993) ... 8

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) ... 6

MD II Entertainment, Inc. v. City of Dallas, 28 F.3d 492 (5th Cir. 1994) ... 16

Montgomery v. Montgomery, 60 S.W.3d 524 (Ky. 2001) ... 19-20

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) ... 7

Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573 (2d Cir. 2000) ... 24

New York Times v. Sullivan, 376 U.S. 254 (1964) ... 7

Nordyke v. Santa Clara County, 110 F.3d 707 (9th Cir. 1997) ... 6

Northern Sec. Co. v. United States, 193 U.S. 197 (1904) ... 29

TABLE OF AUTHORITIES—Continued

Page

Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) ... 3

Pacific Gas & Electric Co. v. Public Utilities Commission, 475 U.S. 1 (1986) ... 11-12

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) ... 2

Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) ... 14

Planned Parenthood Fed'n of America, Inc. v. Bucci, No. 97 Civ. 0629 (KMW), 1997 U.S. WL 133313 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 152 F.3d 920 (2d Cir.), *cert. denied*, 525 U.S. 834 (1998) ... 24

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) ... 7, 9

Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986) ... 3

Procter & Gamble Co. v. Chesebrough-Pond's Inc., 588 F. Supp. 1082 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984) ... 8

Quinn v. Aetna Life & Casualty Co., 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) ... 28-29

Quinn v. Aetna Life & Casualty Co., 96 Misc. 2d 545, 409 N.Y.S.2d 473 (1978) ... 27-29

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) ... 16

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) ... 16-17

Rudisill v. Flynn, 619 F.2d 692 (7th Cir.1980) ... 8

TABLE OF AUTHORITIES—Continued

Page

Rutledge v. Liability Ins. Indus., 487 F. Supp. 5 (W.D. La. 1979) 29

Suzuki Motor Corp. v. Consumers Union of United States, Inc., 292 F.3d 1192 (9th Cir. 2002) 14

U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990) 15

United States v. Bell, No. 1:CV-01-2159, 2003 WL 102610 (M.D. Pa. Jan. 10, 2003) 24

United States v. O'Brien, 391 U.S. 367 (1968) 30

Valentine v. Chrestensen, 316 U.S. 52 (1942) 3

Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997) 16

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 3

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 3, 14, 17

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 19

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985) 15

Statutes

Cal. Bus. & Prof. Code § 17200 13

United States Supreme Court Rules

Rule 37.3(a) 1

37.6 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

Abrams, Floyd, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28 5

Ad Follies, Advertising Age, Dec. 24, 1990, at 24 17

Beech Nut products, http://www.beechnut.com/feeding/index.htm (visited Feb. 12, 2003) 23

BeVier, Lillian R., *Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 Va. L. Rev. 1 (1992) 10

Bhagwat, Ashutosh, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961 (1998) 29

Binole, Gina, *After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting*, Portland Bus. J. (June 28, 1999) (http://forests.org/archive/canada/weywonts.htm) (visited Oct. 24, 2002) 25

Brown, Ed, *Hold the Olives: Martini Marketing*, Fortune, Mar. 2, 1998, at 37 22

CBSNEWS.com, *Stars Profit from Covert Drug Pitches*, Aug. 29, 2002 (http://www.cbsnews.com/stories/2002/08/29/entertainment/main520196.shtml) (visited Feb. 12, 2003) 19

CNN, *Environmental campaigners take aim at oil companies* (May 30, 2002) (http://www.cnn.com/2002/WORLD/europe/05/30/oil.environment.groups.glb/index.html) (visited Jan. 29, 2003) 10

Craswell, Richard, *Interpreting Deceptive Advertising*, 65 B.U. L. Rev. 657 (1985) 10

TABLE OF AUTHORITIES—Continued

Page

Deutsch, Askan, *Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition*, 11 Marq. Sports L. Rev. 41 (2000) 21

Edsall, Thomas B., *Drug Industry Financing Fuels Pro-GOP TV Spots*, Washington Post, Oct. 23, 2003, at A11 29

Elliott, Stuart, *Real or Virtual? You Call It*, N.Y. Times, Oct. 1, 1999, at C1 21

Emord, Jonathan W., *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991) 27

Epstein, Robert, *Public-Interest Group Tilts at Commercial Windmills*, L.A. Times, June 6, 1991, at F7 18

Farber, Daniel, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372 (1979) ... 27

Faulk, Richard O., *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 15 Andrews AIDS Litig. Rep. 10 (2002) 12

Fierman, Jaclyn, *The Big Muddle in Green Marketing*, Fortune, June 3, 1991, at 91 9

Gartner, Michael G., *Advertising and the First Amendment* (1989) 11

Gerber products, http://www.gerber.com/main.asp (visited Oct. 29, 2002) 23

TABLE OF AUTHORITIES—Continued

Page

Goldberg, Michelle, *Confessions of an Undercover Drink Fink*, Salon (Dec. 9, 1997) (http://www.salon.com/media/1997/12/09 media.html) (visited Sept. 28, 2002) 22

Gollin, Andrew S., Comment *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 Marq. L. Rev. 873 (1998) 11

Gurevitch & Blumler, *Political Communication Systems and Democratic Values*, Democracy and the Mass Media (1990) 8-9

Harrelson, Michael, *The Fat Man Sings: Meet the 300-Pound Guerrilla of Undercover Marketing*, Nightclub & Bar Magazine (Feb. 2002) (http://www.nightclub.com /magazine-/February02/cover.html) (visited Sept. 24, 2002) 21-22

Hartman, Cathy L. & Beck-Dudley, Caryn L., *Marketing Strategies and the Search for Virtue: A Case Analysis of The Body Shop, International*, 20 J. Bus. Ethics 249 (1999) 26

Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. 3 (Sept. 12, 1991) 25-26

Helberg, Daniel, Note and Comment *Butt Out: An Analysis of the FDA's Proposed Restrictions on Cigarette Advertising under the Commercial-Speech Doctrine*, 29 Loy. L.A. L. Rev. 1219 (1996) 18

TABLE OF AUTHORITIES—Continued

Page

Hoch, David & Franz, Robert, *Eco-porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 Alb. L. Rev. 441 (1994) 9-10

Howard, Alan, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-based Relational Framework*, 41 Case Western Res. L. Rev. 1093 (1991) 28

http://www.weyerhaeuser.com/citizenship-/philanthropy/partnershipwithcare.asp (visited Oct. 24, 2002) 25

Kavalauskas, Juanita S. & Kahane, Charles J., Nat'l Highway Traffic Safety Admin. Report No. DOT HS 809 208, *Evaluation of the American Automobile Labeling Act* (2001) 27

Kershen, Drew L., *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 Drake J. Agric. L. 141 (1999) 24

Khermouch, Gerry & Green, Jeff, *Buzz Marketing*, Bus. Wk., July 30, 2001, at 54 22

Kozinski, Alex & Banner, Stuart, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990) 6, 14, 19, 30

Lin, C.C. Laura, Note: *Corporate Image Advertising and the First Amendment*, 61 S. Cal. L. Rev. 459 (1988) 25

Lively, Donald E., *The Supreme Court and Commercial Speech. New Words with an Old Message*, 72 Minn. L. Rev. 289 (1987) 14

TABLE OF AUTHORITIES—Continued

Page

Lyons, Daniel, *Play it Again, TiVo*, Forbes (Jan. 28, 2003) (http://www.forbes.com/2003/01/28/cz_dl_0128tivo.html) (visited Feb. 5, 2003) 18

Madow, Michael, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125 (1993) 19

Nord, Thomas, *Stealth marketing—is it the next big thing or just a big fat flop?*, The Courier-Journal (Louisville, KY) (Aug. 3, 2001) (http://www.courier-journal.com/features/columns/popculture/fe20010803pop.html (visited Sept. 24, 2002) 22

Parloff, Roger, *Is Fat the Next Tobacco?: For Big Food, the Supersizing of America is Becoming a Big Headache*, Fortune (Jan. 21, 2003) (http://www.fortune.com/fortune/articles/0,15114,409670-2,00.html) (visited Feb. 10, 2003) 13

Peterson, Melody, *Drug Companies Turn to Celebrities for Advertising*, N.Y. Times, Aug. 14, 2002 (http://www.bayarea.com/mld/cctimes/3857601.htm) (visited Feb. 12, 2003) 19

Post, Robert, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000) 14-15

Procter & Gamble, New Media Age, Apr. 11, 2002, at 28 18

Rapid Response Program, http://www.restaurant.org/pressroom/rrlist.cfm (visited Feb. 8, 2003) 12-13

TABLE OF AUTHORITIES—Continued

Page

Redish, Martin H., *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553 (1997) 9, 11, 14

Rothenberg, Randall, *Now, Novels Are Turning Promotional*, N.Y. Times, Jan. 13, 1989, at D5 ... 17-18

Roush, Chris, *Red Necks, White Socks, and Blue-Chip Sponsors*, Bus. Wk., Aug. 15, 1994, at 74 18

Shelledy, David, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541 (1991) 8

Shiffrin, Steven, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212 (1983) 5

Smolla, Rodney A., *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777 (1993) 16

Snyder, Steven L., *Note: Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. Ill. L. Rev. 301 (1992) 17-18

Strasburg, Jenny, *Ban on Israeli goods has shoppers in uproar: Some demand Rainbow co-op end boycott*, S.F. Chron., Dec. 5, 2002, at B-1 10

Subcomm. On Administrative Practice and Procedure of the Senate Comm. On the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess. 1149 (1978) 25

TABLE OF AUTHORITIES—Continued

Page

Sweet, Jesse H., *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, 24 J. Legal Prof. 201 (2000) 24

Tincher, Rex, *Stealth Marketing in Usenet News Groups* (http://www.tincher.to/ stealth.htm) (visited Feb. 12, 2003) 23

Vranica, Suzanne, *Advertising: That Guy Showing off His Hot New Phone May Be a Shill*, Wall St. J. (July 31, 2002) 21

www.boycottwatch.org 10

Yudof, M., *When Government Speaks* (1983) 9

INTEREST OF AMICI CURIAE

Pacific Legal Foundation, California Manufacturers and Technology Association, California Chamber of Commerce, and New England Legal Foundation respectfully file this brief amicus curiae in support of Petitioners.[1]

Pacific Legal Foundation (PLF) was founded 29 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise. For example, PLF filed amicus briefs in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), *Nevada Department of Human Resources v. Hibbs*, Supreme Ct. Docket No. 01-1368, and *Pharmaceutical Research and Manufacturers of America v. Concannon*, Supreme Ct. Docket No. 01-188. PLF also filed an amicus brief in this case in the court below and supporting the petition for a writ of certiorari.

The California Manufacturers and Technology Association (CMTA) (formerly the California Manufacturers Association) works to improve and preserve a strong business climate for California's 30,000 manufacturers, processors and technology based companies. Since 1919, CMTA has worked with state government to develop balanced laws, regulations, and policies that stimulate economic growth and create new jobs while safeguarding the state's environmental resources. CMTA

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

represents businesses from the entire manufacturing community—a segment of California's economy that contributes more than $250 billion annually and employs more than 2 million Californians.

The California Chamber of Commerce is a voluntary, nonprofit, California-wide business association with more than 15,000 members, both individual and corporate, who represent virtually every economic interest in the state. Ninety percent of the Chamber's members are small- or medium-sized businesses which it represents before the Legislature, local governing bodies, and the courts on a broad range of issues affecting business. The Chamber is involved with legislative, regulatory, and judicial issues involving corporate free speech and the business community.

New England Legal Foundation (NELF) is a nonprofit public interest law firm, incorporated in Massachusetts in 1977. Its membership consists of large and small corporations from all parts of New England and the United States, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF regularly appears before this Court in cases raising issues of general economic significance to the national business community. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Amici will augment Nike's arguments by illustrating the wide range of situations that will be affected by the California Supreme Court's decision in this case. Amici also urge the Court to abandon the current commercial speech doctrine, which no longer provides adequate guidance in a time when commercial and noncommercial speech are blurred beyond the ability of courts to separate them.

SUMMARY OF ARGUMENT

Over the past 60 years, this Court's approach to speech uttered by business interests has ranged from zero protection (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), to very high protection (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)), to a four-part test (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)), which has itself undergone revision (*Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (when a regulation constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product and the ban serves an interest unrelated to consumer protection, it will be subject to a heightened form of First Amendment scrutiny akin to strict scrutiny.)). There have been conflicting analyses depending on the speaker (*Bates v. State Bar*, 433 U.S. 350, 384 (1977), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978) (lesser protection accorded to attorney solicitations) and the social worth of the activity promoted (*Compare Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342, 348 (1986) (restrictions on advertisements for legal gambling facilities do not violate the first amendment) *with Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down)). The divergent lines of commercial speech jurisprudence have produced a well of confusion, the most extreme example of which is the California Supreme Court decision below.

Looking to the future, corporate speech takes many different forms and addresses issues far beyond offering to sell widgets at low, low prices. Even when the speech is fairly straightforward in its attempt to bolster the bottom line, it is so frequently intermingled with otherwise protected speech that

courts simply cannot determine where the speech falls in the tangled web of cases comprising the "commercial speech doctrine." The decision of the California Supreme Court cannot be reconciled with the First Amendment. It can serve only as authority for other courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker. The decision below should be reversed.

ARGUMENT

I

THE CURRENT COMMERCIAL SPEECH DOCTRINE LEADS TO UNPREDICTABLE, AND TROUBLING, RESULTS

The commercial speech doctrine as currently applied by this Court and lower courts can lead to highly unpredictable results, with the majority opinion below identified as Exhibit A. Pulling a little of this and a little of that from a variety of this Court's opinions, a majority of the California Supreme Court developed a new doctrine unlike any this Court—or any other court—ever articulated. Petitioners' Appendix (Pet. App.) at 17a (describing the new "limited purpose" definition of commercial speech). The court below held that "*when a court must decide whether particular speech may be subjected to laws aimed at preventing false advertising or other forms of commercial deception*, categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message." Pet. App. at 17a-18a. The court tries to downplay the nature of its holding, claiming that it merely means "that when a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully." Pet. App. at 2a. There is, of course, nothing to prevent other courts from considering this reasoning persuasive enough to depart

from the consumer fraud context to which the court tries to limit it.

The decision below is the result of this Court's oft-changing, but mostly derisive, approach to corporate speech. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. at 566, this Court formulated a four-part test against which restrictions on commercial speech would be weighed:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

This Court later expanded *Central Hudson*'s inherent flexibility. *See, e.g., Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. at 480 (requiring a "reasonable fit" rather than the least restrictive means to comply with the fourth prong). Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw," Floyd Abrams, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28. *See also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1222 (1983) ("commercial speech" was "an empty vessel into which content is poured").[2]

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[2] Justice Blackmun thought that *Central Hudson's* "chickens have come home to roost" when Cincinnati banned commercial newsstands for the sole reason that commercial speech was deemed less valuable than other speech. *City of Cincinnati v. Discovery*

(continued...)

This Court has been unable to apply the *Central Hudson* analysis in any predictable way. *See, e.g., 44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring) (courts have had difficulty in applying the Central Hudson balancing test "with any uniformity"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 419-20 ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category. . . . The absence of a categorical definition . . . is also a characteristic of our opinions considering the constitutionality of regulations of commercial speech."). Many lower courts have expressly noted their struggle to apply *Central Hudson*. *See, e.g., Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, appellate court described this Court's commercial speech cases, concluding that "the *Central Hudson* test is not easy to apply"); *see also Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (quoting *Discovery Network*, 507 U.S. at 419). Moreover, this Court has noted the entreaties of "certain judges, scholars, and amici curiae" to repudiate *Central Hudson* and "implement[] a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

The commercial speech doctrine has become nearly impossible to apply because "commercial speech" is often extremely difficult, if not impossible, to identify. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 631 (1990) (Kozinski & Banner).

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[2] (...continued)
Network, Inc., 507 U.S. 410, 436 (1993) (Blackmun, J., concurring). This sentiment applies with equal validity to the California Supreme Court's decision below.

This Court has long recognized that speech can serve dual functions.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen v. California, 403 U.S. 15, 26 (1971). The duality of commercial and noncommercial speech becomes critically important when overlaid with the Court's treatment of false or misleading speech. Traditionally, in the realm of noncommercial speech, the government is restrained from acting as the arbiter of truth and falsity. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."). Moreover, the state may not punish its citizens for disseminating false noncommercial information. *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) ("erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 783 (1978) (corporations enjoy same degree of constitutional protection as individuals for direct comments on public issues; thus, corporate sponsored editorials should not be subject to government regulation of falsity); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389-90 (1992) (noting the

difficulty in regulating only "false" advertising); *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984) ("courts are not always able to determine whether an advertising claim is true or false"); *Licata & Co., Inc. v. Goldberg*, 812 F. Supp. 403, 408 (S.D.N.Y. 1993) ("Robust debate between competitors . . . [is] encouraged as part of the hurly-burly inherent in a free market system, and indeed an open society."). *Cf. Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 898-99 (D.C. Cir.1984) (suggesting that First Amendment prohibits governmental assessment of the deceptiveness of political speech); *Rudisill v. Flynn*, 619 F.2d 692, 694 (7th Cir.1980) (footnote omitted) ("We do not regard intentional misstatements of fact made during an election campaign as 'election frauds' in the ordinary sense. The merits of a ballot issue are matters reserved for public and private discussion and debate between opponents and proponents."). Courts' difficulties in ascertaining the truth or falsity (much less misleading nature) of corporate speech leads to highly unpredictable results. The decision of the court below, which would subject all corporate speech to this analysis, is unworkable as a constitutional doctrine.

II

CORPORATE SPEECH PLAYS AN IMPORTANT ROLE IN A FREE SOCIETY AND SHOULD THEREFORE ENJOY FULL FIRST AMENDMENT PROTECTION

Corporate speech enriches public debate by counteracting the dominance of the few media megacorporations, and of government officials who can command free access to the press and other means of disseminating information simply by virtue of their position. David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541, 571-72 (1991) (citing Gurevitch & Blumler, *Political Communication Systems and Democratic Values*, *in* Democracy and the Mass Media

277-78 (1990); M. Yudof, *When Government Speaks* 6-9 (1983)). Given that most individual citizens either cannot or choose not to compete in public debates dominated by the press and the government, adding a component of corporate speech provides "a more diverse discourse than a debate dominated by two, so long as the third does not merely echo the others." *Id.* at 571-72 (citing M. Yudof, *supra*, at 90-110, 161-64). Government may not shut off one side of a public debate because of disagreement with the position sought to be expressed. *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Mosley*, 408 U.S. 92. Relegating commercial speech to second-class status accomplishes the same thing, allowing the government to skew the democratic process to achieve a preordained result and reflecting a mistrust of citizens' ability to make personal choices based on free and open debate. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: the Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553, 579-80 (1997).

Worse, by permitting restrictions on commercial speech, the Court assumes that consumers are unable to separate the wheat from the chaff. There are two problems with this approach. First, consumers frequently demonstrate their ability to view corporate speech with an awareness of the self-interested source of the information. For example, a marketing trend arose in the 1980s and 1990s in which many companies sought to profit from appearing to be ecologically sensitive by "frantically relabeling, repackaging, and repositioning products." David Hoch & Robert Franz, *Eco-porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 Alb. L. Rev. 441, 442 (1994) (citing Jaclyn Fierman, *The Big Muddle in Green Marketing*, Fortune, June 3, 1991, at 91). In 1990, a survey noted that 26% of all new household items "boasted that they were ozone-friendly, recyclable, biodegradable, compostable, or

some other shade of green." *Id.* Despite these claims, an environmental research organization found that "nearly 47% of consumers dismiss environmental claims as 'mere gimmickry.'" *Id.* Given the time and space limitations of the various media outlets, advertising copy is necessarily incomplete. Most advertisements contain more than one message with different meanings to different people. *See* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. Rev. 657, 672-76 (1985). "Consumers are wary whenever they discern that the self-interest of the advertiser would be served by their own uncritical belief in what the advertiser asserts." Lillian R. BeVier, *Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: a Puzzle in the Law of Deception*, 78 Va. L. Rev. 1, 8 (1992).

People are not only quite capable of looking out for their own interests, but are also capable of organizing counter-speech to corporate communications. Frequently, this takes the form of boycotts. *See, e.g.*, CNN, *Environmental campaigners take aim at oil companies* (May 30, 2002) (http://www.cnn.com/2002/WORLD/europe/05/30/oil.environment.groups.glb/index.html) (visited Jan. 29. 2003) (Greenpeace, Friends of the Earth, and World Wildlife Fund urge boycott of oil companies, specifically identifying their action as a response to corporate political contributions); Jenny Strasburg, *Ban on Israeli goods has shoppers in uproar: Some demand Rainbow co-op end boycott*, S.F. Chron., Dec. 5, 2002, at B-1 (grocery store's boycott of Israeli products led to counter-boycott by local Jewish community). Boycotting is such a popular response to corporate speech that an organization called "Boycott Watch" keeps track of all the major boycott actions. *See* www.boycottwatch.org.

Second, denying full protection to commercial speech for this reason ignores the fact that people need to listen to speech from noncommercial sources with an equal amount of skepticism; even core political speech can be rife with

falsehoods and misleading statements. In fact, the blurry, shifting line between political and commercial speech defies capture and definition. While commercial speech "may not affect how people are governed as directly as political speech does, [] it indirectly influences people's attitudes and values about how they should be governed." Andrew S. Gollin, *Comment Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 Marq. L. Rev. 873, 915-16 (1998) (citing Michael G. Gartner, *Advertising and the First Amendment* 9 (1989)). Furthermore, the free flow of commercial speech allows advertisers and consumers to economize their time and effort in deciding how to allocate their resources. *Id.*

> The operation of commercial enterprises and the quality of their products and services give rise to inescapable social and political implications. The very fact that those who seek to reduce free speech protection for "commercial speech" are today so anxious to exclude from that less protected category expression about such products and services other than advertising tends to confirm the inherently ideological message of all commercial speech.

Redish, 24 N. Ky. L. Rev. at 578.

Reducing the First Amendment protection of corporate speech threatens to chill protected speech especially when a business has to respond to adverse publicity. Newsmagazines such as 60 Minutes or public interest organizations have the luxury of spending as much time and money as they wish on investigative reporting before airing adverse publicity. By contrast, an effective corporate response must be made almost immediately to avert or minimize harm or simply to avoid being defined by its detractors. This Court has previously exhibited concern for corporations placed in the position of having to respond to the speech of others. In *Pacific Gas & Electric Co.*

v. Public Utilities Commission, 475 U.S. 1 (1986), the issue was whether a state regulatory commission could require a utility company to permit an activist group to use its billing envelopes to distribute an insert expressing views with which the utility vehemently disagreed. The plurality found that the utility would "feel compelled to respond," *id.* at 16, and characterized the Commission's order as one that actually forced a response. *Id.* at 15 n.11. The court below failed to consider this complication when it concluded that the facts underlying Nike's campaign were "more easily verifiable by the disseminator" and "less likely to be chilled by proper regulation." Pet. App. at 20a. "A strict standard of 'absolute truthfulness' means a besieged corporate speaker with little time to investigate allegations responds at its own risk, creating a 'Hobson's choice' where responding or not responding carries different but equally serious consequences." Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 15 Andrews AIDS Litig. Rep. 10 (2002). As Justice Chin noted in dissent below:

> While Nike's critics have taken full advantage of their right to "'uninhibited, robust, and wide-open'" debate, the same cannot be said of Nike, the object of their ire. When Nike tries to defend itself from these attacks, the majority denies it the same First Amendment protection Nike's critics enjoy . . . .

Pet. App. at 31a (Chin, J., dissenting) (citations omitted).

Companies—and even entire industries—routinely are called upon for rapid response to attacks upon their business practices. For example, the past few years have seen self-proclaimed health advocates excoriate certain restaurant chains for "supersizing" meal portions and thus "causing" obesity in their patrons. With accusations multiplying, the National Restaurant Association created a "Rapid Response Program" specifically designed to "rebut denigrating and

negative portrayals of the restaurant industry wherever they occur in the media." *See Rapid Response Program*, http://www.restaurant.org/pressroom/rrlist.cfm (visited Feb. 8, 2003) (posting letters sent to the editors of SmartMoney Magazine, the Washington Post, the Pittsburgh Post-Gazette, USA Today, and others). Fortune magazine recently noted that McDonalds launched a public relations campaign to counteract the adverse publicity surrounding the filing of such a lawsuit. The article cautions, however, that in California, such defensive claims that food products can be a part of a nutritious diet may lead to liability under the unfair competition law at issue in this case. Roger Parloff, *Is Fat the Next Tobacco?: For Big Food, the Supersizing of America is Becoming a Big Headache*, Fortune (Jan. 21, 2003) (http://www.fortune.com/fortune/articles/0,15114,409670-2,00.html) (visited Feb. 10, 2003). *See also Committee On Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197 (1983) (permitting consumer group's lawsuit against supermarkets, cereal manufacturer, and advertising agency to go forward under Cal. Bus. & Prof. Code § 17200, where lawsuit alleged that advertising for Super Sugar Crisp, Cocoa Crispies, and similar cereals misled parents and children into thinking these "candy breakfasts" provided a nutritional start to the day).

The Court is not unfamiliar with the types of debates spawned by commercial enterprises. In *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), this Court held that an article in Consumer Reports making unflattering comments about stereo speakers was entitled to full First Amendment protection. *As a matter of constitutional law*, it makes no sense to hold that the assertions in Consumer Reports Magazine are so much more objectively verifiable and valuable to society than Bose's press releases in response to

those same magazine articles.[3] Yet, under the commercial speech doctrine—especially as applied by the California Supreme Court—the former receive full First Amendment protection while the latter do not. *See* Redish, 24 N. Ky. L. Rev. at 568-69.

III

CENTRAL HUDSON CANNOT ADEQUATELY PROTECT THE INTERMINGLED SPEECH PREVALENT IN MODERN, INNOVATIVE CORPORATE SPEECH

A profit motive, in and of itself, does not render speech unprotected. *Virginia Pharmacy*, 425 U.S. at 761-62. Instead, this Court held in *Virginia Pharmacy* that the speech is reduced to less-favored status only when it does "'no more than propose a commercial transaction.'" *Id.* at 771 n.24 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). The Court has thus far relied on "common sense" to differentiate between commercial and noncommercial speech. *Id.* The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech and (2) that commercial speech is more durable than other types of speech. *Id.*, *see also Central Hudson*, 447 U.S. at 564 n.6. Both distinctions have been criticized by judges and scholars. *See, e.g.*, Kozinski & Banner, 76 Va. L. Rev. at 635-38; Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 296-97 (1987); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev.

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[3] Consumer Reports is not immune to charges that it engages in biased reporting. *See Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 292 F.3d 1192, 1203 (9th Cir. 2002) (finding that the publisher of Consumer Reports had a financial motive to falsify test results related to the propensity of a Suzuki Samurai to rollover on sharp turns).

1, 31-32 (2000). Given that these distinctions no longer appear a solid foundation for diminished constitutional protection, and given the innovative new methods of advertising and marketing in contemporary society, reliance on a "common sense" approach can lead only to confusion.

In *Bolger v. Youngs Drug Product Corp.*, 463 U.S. 60, 68 (1983) (quoting *Central Hudson*, 447 U.S. at 563 n.5), this Court held that "advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech" because "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." The Court reiterated this holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), in which a state supreme court sanctioned a lawyer for running deceptive newspaper advertisements for his services in bringing personal injury actions related to use of Dalkon Shield contraceptives. Because some of the advertisements contained statements regarding the legal rights of persons injured by the Dalkon Shield, the Supreme Court recognized that such statements "in another context, would be fully protected speech." *Id.* at 637 n.7. Based on these cases, the Third Circuit Court of Appeals found that advertisements by rival health care insurance companies that included information about health care insurance and delivery—matters indisputably at the center of public debate—do not escape the commercial speech category. *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 937 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990). In each of these cases, the court suppressed noncommercial speech related to important public debates for the sole reason that it was coupled with commercial speech. The patronizing assumption that people cannot discount speech made by someone with an interest in a particular outcome has now led to a California decision in which the corporate side of

a public debate is stifled in its entirety. Pet. App. at 31a (Chin, J., dissenting) (arguing that Nike's speech is deprived of First Amendment protection only because the company "competes not only in the marketplace of ideas, but also in the marketplace of manufactured goods").

R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992), suggests a different approach. In that case, this Court held that even speech that normally receives less First Amendment protection may not be regulated in such a way that the state discriminates on the basis of content or viewpoint. A number of lower courts have either applied or considered applying *R.A.V.* to content-based commercial speech restrictions. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1331 n.3 (9th Cir. 1997) (citing *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994)) (acknowledging potential application of *R.A.V.* to content-based commercial speech regulation); *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *R.A.V.* and *Central Hudson* to speech regulation without deciding which is required); *Citizens United for Free Speech II v. Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in *R.A.V. []*, that commercial speech must be protected by the usual strictures against content-based distinctions.").

A. Marketing and Advertising Are No Longer Necessarily Identifiable or Separable from Noncommercial Speech

As a corollary to the government's ability to regulate commercial transactions, the government also assumes the ability to regulate commercial speech. *See* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 780 (1993). The Court has already conceded that "commercial speech" is not easily defined. *See, e.g., Rubin v.*

Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed."); *Bolger*, 463 U.S. at 81 (Stevens, J., concurring) ("[T]he impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted."). These "ambiguities" however, threaten to overcome the rest of the category.

The speech in this case involved press releases, letters to the editor, letters to university athletic directors, and the like describing Nike's overseas labor practices. Pet. App. at 21a. Far from the prototypical commercial speech of offering to sell X product for Y price (*see Virginia Pharmacy*, 425 U.S. at 761), the speech at issue in this case was intended to rehabilitate a corporate image as well as provide information to the public on a matter of broad concern. Extending the lesser protection of the commercial speech doctrine to this type of speech threatens a wide variety of public relations communication. These include:

"Product placement," an arrangement whereby a movie studio incorporates certain commercial products into its film in exchange for cash or free use of the product. Steven L. Snyder, *Note: Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?* 1992 U. Ill. L. Rev. 301 (1992). For example, in 1990, Disney reportedly charged advertisers $20,000 to show the product without comment, $40,000 to show the product and have an actor mention the product's name, and $60,000 for an actor to be shown using the product. *Id.* at 305 (citing *Ad Follies*, Advertising Age, Dec. 24, 1990, at 24). Product placement began in feature films and television, but other media have followed suit. For example, author Beth Ann Herman featured a Maserati in her novel *Power City*. The protagonist drives a Maserati whose "V-6 engine had two turbochargers, 185 horsepower and got up to 60 in under 7 seconds." *Id.* at 308 n.65 (citing Randall

Rothenberg, *Now, Novels Are Turning Promotional*, N.Y. Times, Jan. 13, 1989, at D5). In exchange, a Beverly Hills Maserati dealership threw a $15,000 party for Herman that attracted nationwide television coverage. *Id.* Even record albums are not exempt. Barbara Mandrell's album, *No Nonsense*, was made with the financial support of the No Nonsense panty-hose manufacturer. *Id.* at 308 n.67 (citing Robert Epstein, *Public-Interest Group Tilts at Commercial Windmills*, L.A. Times, June 6, 1991, at F7).[4]

Sponsorships, by which a company underwrites the production of a television show, concert, or sporting event. The early days of television were marked by shows like Texaco Star Theater. "Soap operas" were so called because they were sponsored originally by Proctor & Gamble. *Procter & Gamble*, New Media Age, Apr. 11, 2002, at 28. Animal lovers will remember "Mutual of Omaha's *Wild Kingdom*." R.J. Reynolds has sponsored the Winston Cup series since 1970. Chris Roush, *Red Necks, White Socks, and Blue-Chip Sponsors*, Bus. Wk., Aug. 15, 1994, at 74, *cited in* Daniel Helberg, *Note and Comment Butt Out: an Analysis of the FDA's Proposed Restrictions on Cigarette Advertising under the Commercial-Speech Doctrine*, 29 Loy. L.A. L. Rev. 1219, 1222 n.23 (1996)).

Testimonials became part of main-stream marketing in the 1920s, when Pond's cold cream paid "Great Ladies" (including Mrs. Reginald Vanderbilt, Queen Marie of Rumania, and the Duchess de Richelieu) to sing the praises of the

[4] In the age of TiVo, in which viewers can use computer technology to download broadcasts minus the commercials, advertisers have used product placement and other ways to interject favorable mentions of their products into the programs themselves. *See* Daniel Lyons, *Play it Again, TiVo*, Forbes (Jan. 28, 2003) (http://www.forbes.com/ 2003/01/28/cz_dl_0128tivo.html) (visited Feb. 5, 2003).

moisturizer in exchange for contributions to charity. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 Cal. L. Rev. 125, 164-65 (1993). Lately, however, it is not necessarily apparent that those giving testimony are paid to tout the product. For example, actress Kathleen Turner appeared on CNN in August, 2002, to discuss her struggles with rheumatoid arthritis. She failed to mention that the makers of Enbrel, a drug that battles the condition, paid her to appear. CBSNEWS.com, *Stars Profit from Covert Drug Pitches*, Aug. 29, 2002 (http://www.cbsnews.com/stories/ 2002/08/29/entertainment/main520196.shtml) (visited Feb. 12, 2003). Similarly, Lauren Bacall appeared on "NBC Today," telling the story of a friend who had gone blind due to macular degeneration and then discussed a new drug that could prevent blindness from that cause. Novartis, the maker of the drug, paid for Ms. Bacall's appearance on the show, a fact revealed to the audience by neither Ms. Bacall nor NBC. Melody Peterson, *Drug Companies Turn to Celebrities for Advertising*, N.Y. Times, Aug. 14, 2002 (http://www.bayarea.com/mld/cctimes/ 3857601.htm) (visited Feb. 12, 2003).[5]

Music videos also blur the line between commercial and noncommercial speech. *See* Kozinski & Banner, 76 Va. L. Rev. at 641. Music itself, of course, is entitled to full First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). A primary function of a music video is to promote the artist and the song, in hopes of persuading consumers to buy the album on which the song appears. Yet whether the video is treated as lesser-protected commercial speech is not obvious under the Court's current jurisprudence. The Kentucky Supreme Court, apparently the only court to consider this issue, held in *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001), that

[5] In response to public outcry, CNN now requires full disclosure of commercial endorsements for any guest who appears on the network.

> While music videos are not produced primarily for the sale of the video but, rather, the underlying song, this does not strip them of their First Amendment protection. Music videos are in essence mini-movies that often require the same level of artistic and creative input from the performers, actors, and directors as is required in the making of motion pictures. Moreover, music videos are aired on television not as advertisements but as the main attraction, the airing of which, consequently, is supported by commercial advertisements. Simply put, the commercial nature of music videos does not deprive them of constitutional protection.

This holding provoked a dissent that seems equally plausible:

> A music video stands to an album the same way that a movie "trailer" or "teaser" stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are "doubly" commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the videos that they believe will generate the highest advertising revenue. The video channels' unwillingness to broadcast controversial materials—materials likely to spook boycott-wary advertisers—provide additional evidence of the essentially commercial nature of the undertaking.

Id. at 534 (Keller, J., dissenting). The disagreement between the majority and dissent in *Montgomery* is significant only because the categorization of the video impacts the level of protection to which it is entitled under the First Amendment.

"Virtual advertising," is a form of digital technology that allows advertisers to insert computer-generated brand names, logos, or animated images into previously recorded television

programs or movies. Askan Deutsch, *Sports Broadcasting and Virtual Advertising: Defining the Limits of Copyright Law and the Law of Unfair Competition*, 11 Marq. Sports L. Rev. 41, 42 (2000). It uses computers to place still or video images into live video broadcasts in real time so that they look as if they are part of the original scene. For example, several Major League Baseball teams have made use of virtual advertisements along the wall behind home plate. *Id.* (citing Stuart Elliott, *Real or Virtual? You Call It*, N.Y. Times, Oct. 1, 1999, at C1). Virtual advertising blurs the line between television programming and commercials. *Id.* at 44.

"Stealth" or "guerilla" marketing is a new way of using undercover actors to promote a product without the public being aware that the actors are paid by the product's manufacturer. For example, the United States arm of Sony Ericsson Mobile Communications Ltd. hired men and women to pose as tourists at tourist attractions in New York City, then ask passers by to take their picture with Sony's new phone/digital camera. Sony also hired attractive women to sit at opposite ends of a bar in a nightclub and play a computer game on their phones while engaging other patrons in conversation about their cool new toy. Under no circumstances are the actors supposed to tell the passers by or club patrons that they are employed by Sony. Suzanne Vranica, *Advertising: That Guy Showing off His Hot New Phone May Be a Shill*, Wall St. J. (July 31, 2002). Moreover, the actors do not make any type of sales pitch, they simply demonstrate the product and make flattering comments about it. *Id.* Similarly, the public relations firm representing a new flavored-water brand dispatched young women fitting the target demographic to trendy Manhattan bars and clubs to be seen drinking the specific brand and making favorable comments about it to unsuspecting bar patrons. Michael Harrelson, *The Fat Man Sings: Meet the 300-Pound Guerrilla of Undercover Marketing,* Nightclub & Bar Magazine (Feb. 2002) (http://www.nightclub.com/magazine-/February02/

cover.html) (visited Sept. 24, 2002) (profiling Jonathan Ressler, CEO of Big Fat, Inc., a public relations firm that is at the vanguard of undercover marketing techniques). *See also* Ed Brown, *Hold the Olives: Martini Marketing*, Fortune, Mar. 2, 1998, at 37 (describing how Hennessey recruited hip young barhoppers to drink "Hennessey martinis" and other cognac drinks undercover at trendy bars during a five year campaign to reach 21-32 year old drinkers); Michelle Goldberg, *Confessions of an Undercover Drink Fink*, Salon (Dec. 9, 1997) (http://www.salon.com/media/1997/12/09media.html) (visited Sept. 28, 2002) (first-hand account of methods used to sell cognac martinis without expressly offering to conduct a commercial transaction).

This type of marketing is not restricted to high-tech gadgets and liquor. Record companies may plant attractive young women in record shops, paid to notice the album in a customer's hand and helpfully suggest other artists the customer may like. Thomas Nord, *Stealth marketing—is it the next big thing or just a big fat flop?*, The Courier-Journal (Louisville, KY) (Aug. 3, 2001) (http://www.courier-journal.com/features/columns/popculture/fe20010803pop.html (visited Sept. 24, 2002). Scooter companies pay college students to hang outside coffee shops, striking up conversations with customers and casually mentioning their new rides. Gerry Khermouch & Jeff Green, *Buzz Marketing*, Bus. Wk., July 30, 2001, at 54. Children are given copies of hot new portable video games, urging them to bring it to class and show all their friends. *Id.* at 55.

Providing helpful advice (while selling a little something on the side) is also a time-honored method of marketing that is evolving into a particularly powerful tool on the Internet. Using this method, an entrepreneur seeks out chat groups on the Internet that discuss issues related to what he has to sell. For example, someone who wants to sell bookkeeping software will find (e.g., through Yahoogroups) groups of people who talk

about finances. He will "lurk" long enough to get a feel for the group's discussions, and then start contributing. He will spend the bulk of his time joining in the discussion and some percentage correctly answering questions related to his product. Each of his posts will link to his own webpage where he offers software for sale. After becoming a trusted member of the group, he will find occasional opportunities to suggest a "meeting" via private e-mail to discuss how the software can meet a particular person's special needs. Rex Tincher, *Stealth Marketing in Usenet News Groups* (http://www.tincher.to/stealth.htm) (visited Feb. 12, 2003).

Another common incarnation of this technique is found on websites geared toward parents, mothers in particular. Baby food manufacturers have websites chock full of helpful information as to when baby should achieve developmental milestones, advice how to encourage baby to eat new foods, health advice for the expectant and breastfeeding mother, and so on. Some even have a doctor on staff to answer e-mail inquiries. Of course, the websites also provide information for purchasing products, but one may peruse the sites at length without ever making a purchase. *See, e.g.*, website for Gerber products, http://www.gerber.com/main.asp (visited Oct. 29, 2002) (home page points readers to information about nutritional development, new products, and "expert advice, anytime, day or night"); website for Beech Nut products, http://www.beechnut.com/feeding/index.htm (visited Feb. 12, 2003) (tips on immunizations, allergies, babysitters, and suggested menus for babies of different ages).

Websites as commercial speech have not yet generated much caselaw,[6] but, especially as regards lawyer advertising,

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[6] One example is *Ford Motor Co. v. Tex. Dep't of Transportation*, 264 F.3d 493, 505 (5th Cir. 2001), in which Ford challenged a Texas law prohibiting the sale of used vehicles via a website as violating its

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they have generated some law review articles concerned about whether law firms' websites are subject to state rules regarding solicitation. *See, e.g.*, Drew L. Kershen, *Professional Legal Organizations on the Internet: Websites and Ethics*, 4 Drake J. Agric. L. 141, 145 (1999) ("Even if a website or publication is primarily informational, if the content or context indicates the solicitation for a commercial relationship, the website or publication is commercial speech subject to state regulation."); Jesse H. Sweet, *Attorney Advertising on the Information Superhighway: A Crash Course in Ethics*, 24 J. Legal Prof. 201, 210 (2000).[7]

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[6] (...continued)
First Amendment right to speech. The Fifth Circuit held that the advertising and information on Ford's website constitutes commercial speech and, applying *Central Hudson*, upheld the regulation. *See also United States v. Bell*, No. 1:CV-01-2159, 2003 WL 102610 (M.D. Pa. Jan. 10, 2003) (operator of website which promoted tax avoidance was engaged in commercial speech); *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (domain names may or may not be commercial speech depending on variety of factors).

[7] In *Planned Parenthood Fed'n of America, Inc. v. Bucci*, No. 97 Civ. 0629 (KMW), 1997 U.S. WL 133313 (S.D.N.Y. Mar. 24, 1997), *aff'd*, 152 F.3d 920 (2d Cir.), *cert. denied*, 525 U.S. 834 (1998), the defendant, doing business as Catholic Radio, registered a website at "plannedparenthood.com." However, the website was actually dedicated to the pro-life position and opposed abortion. *Id.* at *5-*6. The defendant argued that his use of plaintiff's mark was noncommercial speech. *Id.* at *9. The court disagreed for two reasons: First, although the use of "plannedparenthood.com" was arguably noncommercial in of itself, it impacted the plaintiff's ability to offer its own services over the Internet. Second, the very use of the Internet is "in commerce" because it requires interstate phone lines to connect. *Id.* at *11-*12.

B. Speech Intended to Bolster a Corporate Image Should Be Fully Protected Under the First Amendment

Corporate image advertising "describes the corporation itself, its activities or its views, but does not explicitly describe any products or services sold by the corporation." Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, Sourcebook on Corporate Image and Corporate Advocacy Advertising, 95th Cong., 2d Sess. 1149, 1156 (1978), *quoted in* C.C. Laura Lin, *Note: Corporate Image Advertising and the First Amendment*, 61 S. Cal. L. Rev. 459, 461 (1988). There are, generally, two types of image advertising. The first is advertising that treats the company itself as a product to be sold. For example, lumber giant Weyerhaueser has been reviled by environmentalists for clear-cutting certain forest areas. *See, e.g.*, Gina Binole, *After Buying MacBlo, Weyerhaeuser Won't Commit on Clear-Cutting*, Portland Bus. J. (June 28, 1999) (http://forests.org/archive/canada/weywonts.htm) (visited Oct. 24, 2002). Promoting its image as a responsible steward of the earth, Weyerhauser has publicized its partnership with CARE, one of the world's largest international relief and development organizations. Together, they will teach "sustainable forest management and environmental stewardship to improve the lives of people in developing countries for current and future generations." *See* http://www.weyerhaeuser.com/citizenship-/philanthropy/partnershipwithcare.asp (visited Oct. 24, 2002).[8]

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[8] Similarly, in testimony to Congress, former FDA Commissioner David Kessler noted that tobacco companies engaged in image building through "promotional events labeled as scientific and technical seminars, special journal supplements and video news releases." Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 102d

(continued...)

This type of image advertising also includes companies that project an ethos of social responsibility and a political philosophy that consumers presumably can share and support through the purchase of the companies' products. For example, The Body Shop sells cosmetics and one might reasonably presume that its communications with the public are intended to sell soap and moisturizers. The company's owner contends that the central mission of business is to improve the world by not only caring for its work force and customers, but also for its communities and the environment. She believes that business should be a force for social good first, and consider bottom line profits second. Cathy L. Hartman & Caryn L. Beck-Dudley, *Marketing Strategies and the Search for Virtue: A Case Analysis of The Body Shop, International*, 20 J. Bus. Ethics 249 (1999). Thus, The Body Shop's mission statement

> specifies that social, environmental, and political values are the fundamental bases of exchange with its constituents. Specifically, the company's first commitment is to "social and environmental change," and, second, to the "financial and human needs" of its stakeholders. Further, its product pledge involves "the protection of the environment, human and civil rights" within the cosmetics industry.

Id. Whether it is Weyerhaeuser's forest management or the Body Shop's focus on "natural" skin care reflecting broader environmental concerns, these businesses are speaking on relevant issues that do not come close to asking consumers to buy their products.

The second type of image advertising takes positions on public issues. As such, it is even further removed from actual

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[8] (...continued)
Cong., 1st Sess. 3 (Sept. 12, 1991) (statement of David A. Kessler, M.D., Commissioner of Food and Drugs).

commercial transactions than advertising to promote the company itself as a product. For example, when inexpensive Japanese compact cars began to flood the market, American automakers responded by urging consumers to "buy American."[9] When the president of an American automobile company takes out an advertisement in a newspaper or buys air time on a network to urge people to "buy American," he may argue that by purchasing foreign automobiles Americans are putting other Americans out of work, and that buying his company's cars is a patriotic act. The speech is profit motivated. It proposes a commercial transaction. It directly concerns the economic interests of the speaker, and it is a commercial announcement. However, it also touches on matters of pressing political concern—consumer choice, protectionism, and free trade. Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (1991). "Information about the quality and price of some products may relate to important political issues. For example, a belief that American cars are over priced influences views on foreign car import restrictions, on inflationary price increases for domestic cars, and on the effects of oligopoly . . . ." *Id.* (quoting Daniel Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev. 372, 382 (1979)).

In *Quinn v. Aetna Life & Casualty Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (1978), a state court trial judge ruled that an

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[9] To assist consumers in complying with this exhortation, Congress passed the American Automobile Labeling Act, which requires passenger vehicles manufactured after October 1, 1994, to have labels specifying their percentage value of U.S./Canadian parts content, the country of assembly, and countries of origin of the engine and transmission. Juanita S. Kavalauskas & Charles J. Kahane, Nat'l Highway Traffic Safety Admin. Report No. DOT HS 809 208, *Evaluation of the American Automobile Labeling Act* (2001).

insurance company's advertisements blaming high insurance premiums on large tort damage awards was commercial speech and, thus, could be enjoined if found to be false or misleading. Plaintiffs involved in on-going personal injury actions sought to enjoin Aetna from continuing publication of statements in certain magazines that criticized the tort system and what Aetna perceived to be excessive damages awarded in many personal injury cases. *Id.* at 548-49, 409 N.Y.S.2d at 474-75. The plaintiffs argued that the advertisements contained misleading statements violating New York law. *Id.* at 549, 409 N.Y.S.2d at 475. Aetna responded that its publications advocating tort law reform were political expression and fully protected by the First Amendment. *Id.* The fundamental disagreement was whether the mixed commercial/political speech should be deemed one or the other. This is a question like, "is *The Wizard of Oz* a black and white film or in color?" Sometimes there is no getting around the fact that it is both. *See* Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-based Relational Framework*, 41 Case Western Res. L. Rev. 1093, 1143 (1991).

The state judge ruled that the statements were commercial speech that could be enjoined if false or misleading. *See Quinn*, 96 Misc. 2d at 553-54, 409 N.Y.S.2d at 478. The court made its ruling despite the fact that Aetna's purpose was to influence potential jurors to give lower damage awards, rather than targeting its statement at consumers who might purchase insurance products. *Id.* at 554, 409 N.Y.S.2d at 478. When the case was removed to federal district court, *Quinn v. Aetna Life & Casualty Co.*, 482 F. Supp. 22, 29 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) (per curiam), the district court judge concluded that the advertisements were not commercial speech, *id.*, and the Second Circuit affirmed. *Quinn*, 616 F.2d at 40. The federal district judge concluded that the state court judge had "engaged in a fundamental misconception by calling the

advertisements here in question 'commercial speech.'" *Quinn*, 482 F. Supp. at 29.[10]

The pharmaceutical industry has also sponsored political advertisements—"issue ads"—that praise certain candidates' stands on prescription drug legislation. The advertisements are prepared and placed by a nonpartisan group called United Seniors Association, but that group is funded largely by unrestricted educational grants from the Pharmaceutical Research and Manufacturers of America. Thomas B. Edsall, *Drug Industry Financing Fuels Pro-GOP TV Spots*, Washington Post, Oct. 23, 2002, at A11. The drug companies that are members of PhRMA undoubtedly would benefit economically if the positions they are advertising are enacted into law. Under the California Supreme Court's analysis, this core political speech could be transformed into commercial speech entitled to lesser protection.

CONCLUSION

While hard cases may make bad law, *see Northern Sec. Co. v. United States*, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting), sometimes "it is bad law that is creating the hard cases." Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 984 (1998). *Central Hudson* falls into this category. The issue before the California Supreme Court in this case should not have been "hard." But until this Court simplifies First Amendment

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[10] *See also Rutledge v. Liability Ins. Indus.*, 487 F. Supp. 5 (W.D. La. 1979), also involving insurance company advertising statements, the court similarly held that the advertisements were not commercial speech because "[t]he ads [made] no attempt to sell insurance or to recommend any particular type of insurance coverage . . . ." *Id.* at 8. Finding the speech to be fully protected noncommercial speech, the district court concluded that issuing an injunction in the case would be tantamount to imposing a prior restraint on publication in violation of the First Amendment. *Id.* at 8-9.

jurisprudence by protecting corporate engagement in public debate, lower courts will continue to struggle and the citizenry will be deprived of all sides of important controversies.

The Court should treat all speech as deserving the same protection under the First Amendment. The government then could regulate commercial speech and mixed speech just as it would political speech: regulation is constitutional where it furthers an important governmental interest, the governmental interest is unrelated to the suppression of free expression, and the restriction on expression is no greater than necessary. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Consumer fraud statutes could still exist, albeit in much narrower form than California's unfair competition law. There is no question that preventing consumer fraud furthers a substantial governmental interest. The critical point is that while the seller is free to make true, false, or misleading claims, he will be liable if buyers rely on those claims to make purchases. *See* Kozinski & Banner, 76 Va. L. Rev. at 651. When there is no reliance, and no harm, then private counterspeech will serve to remedy falsehoods placed before the public.

The judgment of the California Supreme Court should be reversed.

DATED: February, 2003.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

(26)

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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On Writ of Certiorari
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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a nonpartisan, nonprofit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including free speech rights, property rights, privacy rights, the right to keep and bear arms, the freedom of association, and religious freedoms. Of particular importance to the Center in this case are constitutional protections for the freedom of speech, including the right of business persons and corporations to engage in robust public discussion and debate regardless of whether their speech is categorized as commercial.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. At its core, the "commercial speech" doctrine addresses speech that does nothing more than propose a commercial transaction. Because such transactional speech is intertwined with, and forms part of, the underlying transaction, it may indeed present different concerns than does purely communicative speech. Those concerns, however, do not warrant a separate and special doctrine for commercial speech. Instead they can be addressed by treating transactional commercial speech as an instance of mixed speech and conduct and thus applying the familiar test for regulations of mixed speech and conduct found in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Substitution of that standard approach in place of the current commercial speech doctrine would be more consistent with overall First Amendment principles and would readily resolve this case. Nike's speech at issue here is not the transactional speech that is at the core of existing commercial speech doctrine, involves only pure speech, and should be treated no differently than any other speech.

Absent a complete rejection of the commercial speech doctrine and a return to standard First Amendment jurisprudence, this Court has several other options for bringing coherence to the area of commercial speech and for countering the uncertainty and burden on speech created by the decision below. One approach would be to confine the commercial speech doctrine to core transactional speech and exclude all non-transactional speech by commercial speakers from the scope of the doctrine. That solution would add considerable certainty to the definition of commercial speech, returning it to its earlier formulations, and would provide needed protection for speech that is most likely to involve matters of public importance regardless of the character of the speaker. Alternatively, this Court could create specific bright-line exclusions from the commercial speech doctrine for speech that involves a publicly debated issue and for speech that involves the character and operations of a public company. Both types

of speech, by definition, involve matters of public concern, particularly given the growing importance of and focus on corporate governance and operations. And by offering clear and defined limits on the lesser-protected category of commercial speech, such exclusions would create the breathing room necessary for debate about commercial topics of public concern. Under any of the suggested approaches, Nike's speech in this case would be fully protected and the decision below would be in error.

2. Even assuming, *arguendo*, that Nike's speech fell within the current commercial speech doctrine and that such doctrine were to remain intact, several aspects of the California speech-liability regime in this case combine to call for heightened scrutiny regardless of the treatment of commercial speech in general. In particular, California has removed numerous procedural protections on litigation in this area that have historically served to limit the speech-suppressing effect of common-law causes of action, it has discriminated between commercial and noncommercial speakers whose statements have functionally identical effects on consumers, and it has imposed a nationwide standard for speech by threatening to penalize extraterritorial speech that made it to California through the ordinary processes of an integrated national media. The result is a tremendous burden on both commercial and noncommercial speech.

Those aspects of the California liability regime offend not only the First Amendment, but intrude upon values also protected by the Due Process, Equal Protection, and Commerce Clauses. Operating, as it does, at the intersection of the First Amendment and multiple other constitutional safeguards, the California regime deserves heightened scrutiny regardless of whether it nominally targets only lesser-protected commercial speech. Just as equal protection or due process analysis ratchets up when another fundamental right is involved, so too should First Amendment scrutiny increase when other constitutional values are simultaneously implicated.

ARGUMENT

The California Supreme Court held that speech on one side of a hotly debated issue of public concern nonetheless received lower First Amendment protection as "commercial speech" because the speaker was a commercial entity and the topic related to the speaker's own business. Pet. App. 1a. Based on that flawed conclusion, the court below upheld a California speech-liability regime that lacks even a modicum of procedural or substantive safeguards for speech based on the assumption that "governments may entirely prohibit commercial speech that is false or misleading." *Id.* Both elements of the court's reasoning were dangerously wrong.

Nike's speech in this case should not be categorized as commercial speech for purposes of lowering its protection under the First Amendment. This Court should either clarify or abandon existing commercial speech doctrine to ensure the proper level of protection for the type of public debate at issue in this case. Furthermore, because the California regime restricts speech in a manner that also offends Due Process, Equal Protection, and Commerce Clause interests, it should receive heightened scrutiny under the First Amendment regardless of whether it targets generally less-protected commercial speech.

I. THE COMMERCIAL SPEECH DOCTRINE SHOULD BE PARED BACK TO BE CONSISTENT WITH STANDARD FIRST AMENDMENT DOCTRINE.

The California Supreme Court was able to reach its burdensome result in this case by applying an overly broad definition of "commercial speech" and then excessively denigrating the First Amendment protection given to such speech. While there is much to criticize about the interpretation of this Court's cases by the decision below, this case presents the far more valuable opportunity to reconsider the continuing validity of the commercial speech doctrine or, at a minimum, its scope and substance.

It is the Center's view that the separate commercial speech doctrine as developed through cases such as *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), is inappropriate and unnecessary. Rather, the legitimate regulatory concerns at the intersection of speech and commercial transactions can and should be handled through the application of the familiar test from *United States* v. *O'Brien*, 391 U.S. 367 (1968), for regulations of conduct that have an incidental impact on speech. And even were this Court to decline to reconsider the overall existence of the commercial speech doctrine, a focus on a more traditional approach to speech intertwined with conduct can serve as a valuable guide to imposing sensible limits on the scope and substance of the existing doctrine.

A. Core Commercial Speech Involves Mixed Speech and Conduct That Should Be Subject to Traditional First Amendment Analysis.

When grappling with the First Amendment scrutiny appropriate for so-called "commercial speech," this Court has concerned itself primarily with "speech that does no more than propose a commercial transaction." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 544 (2001); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993); *Board of Trustees* v. *Fox*, 492 U.S. 469, 473-74 (1989); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). Such speech indeed raises concerns different from those raised by pure speech alone because it is intertwined with, and an inseparable component of, the underlying commercial transaction itself. Speech that proposes a commercial transaction thus is properly viewed as mixed speech and conduct rather than as pure speech.

At times, however, this Court has expanded the category of commercial speech to include pure speech that merely relates to a speaker's business activities and does not form part of a transaction itself. *See Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983) (identifying commercial speech based on advertising format, product reference, and speaker motivation); *Central Hudson*, 447 U.S. at 561 (commercial speech described as "expression related solely to the economic interests of the speaker and its audience"). That more expansive approach, and the resulting reduction in First Amendment protection that has accompanied categorization as commercial speech, lacks a sound basis under the First Amendment.

In recent years, the commercial speech doctrine has become subject to considerable criticism. *United Foods*, 533 U.S. at 409 (citing *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (THOMAS, J., dissenting)); *44 Liquormart, Inc.* v. *Rhode Island,* 517 U.S. 484, 518 (1996) (THOMAS, J., concurring in part and concurring in judgment); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 493 (1995) (STEVENS, J., concurring in judgment)). That criticism reflects the lack of a historical or logical basis for treating so-called commercial speech differently from similar noncommercial speech. Much of that criticism could be resolved or mitigated by confining application of the commercial speech doctrine to its core of speech that "does no more than propose a commercial transaction." Such "transactional" speech is indeed "'linked inextricably' with the commercial arrangement that it proposes," *Edenfield*, 507 U.S. at 767 (citation omitted), and implicates legitimate state regulatory interests regarding the commercial transaction itself. Better still, this Court should abandon any distinct commercial speech doctrine and instead analyze the mixed speech and conduct in transactional speech through application of the familiar *O'Brien* test for regulations of conduct that create incidental burdens on speech. *O'Brien,* 391 U.S. at 377.

In *O'Brien*, the law at issue forbade harmful conduct – the destruction of an official document – that at times was intertwined with expression. *Id.* at 376. The law was upheld because the impact on speech was "incidental" to the underlying regulation of conduct, was "no greater than [was] essential" to accomplishing the interests of regulating the conduct, and met additional conditions designed to safeguard First Amendment values. *Id.* at 377.

In like manner, where the government seeks to regulate a commercial transaction, speech that proposes, and therefore is inextricably intertwined with, that transaction may incidentally be burdened by the regulation without offending the First Amendment. But the regulation would have to target the *operative* elements and effects of such speech – *i.e.*, the legally effective aspects of the speech such as the terms of an offer – and not merely the further or separate *communicative* aspects of the speech. For incidental burdens on any speech not itself effectuating the commercial transaction, the ordinary limits of *O'Brien* would apply and any regulation of the underlying transaction would have to be imposed for the "noncommunicative impact of [the] conduct, *and for nothing else.*" *Id.* at 382 (emphasis added).

Use of the *O'Brien* test for core commercial speech adequately protects the government's legitimate interests in regulating the intertwined conduct of commercial transactions without sacrificing the communicative value of speech mixed with such transactions. And by being squarely within standard First Amendment analysis for speech in general, it obviates the need for constant litigation over the proper categorization of speech as commercial or noncommercial.

B. The Lesser Protection of the Commercial Speech Doctrine Lacks a Sound Basis.

The need to replace the commercial speech doctrine with standard First Amendment analysis applicable to all speech is reflected in the inadequate justifications given for differential

treatment of commercial speech. The decision below stands as an example of how commercial speech analysis has grown increasingly strained, especially when applied beyond the core of "transactional" speech.

The California Supreme Court recited three reasons for the reduced First Amendment protection given to commercial speech:

> First, "[t]he truth of commercial speech * * * may be *more easily verifiable by its disseminator* than * * * news reporting or political commentary" * * *.
>
> * * *
>
> Second, commercial speech is *hardier* than noncommercial speech in the sense that commercial speakers, because they act from a profit motive, are less likely to experience a chilling effect from speech regulation.
>
> * * *
>
> Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies a power to regulate speech that is "'linked inextricably' to those transactions."

Pet. App. 11a-12a (citations omitted).

Those arguments do not justify a wholly separate standard of First Amendment scrutiny even for core transactional speech, and they lose all persuasive force when used in an attempt to distinguish non-transactional speech on a commercial topic – such as Nike's speech in this case – from other forms of fully protected speech.

Verifiability. The suggestion that the truth of commercial speech is more readily verified by the speaker than with noncommercial speech is both incorrect and irrelevant. Even within the core of transactional speech, many elements of a transaction are no more subject to precise determinations of truth or falsity than are comparable instances of political, economic, or other speech. The myriad of cases interpreting

ambiguous terms in commercial contracts seem proof enough of that proposition. And the simple example of a warranty of "suitability" is as subject to debate and disagreement as is a politician's claim of suitability for a particular elected office. Conversely, while certain aspects of commercial speech relating directly to a product indeed may be quite verifiable, a politician's recitation of his own background is likewise fully verifiable by the political speaker. The ease of verification of various statements by politicians does not cause differential treatment of political speech and likewise should not degrade the protection of commercial speech.

As for non-transactional speech on commercial matters, such speech is no more or less verifiable by the speaker than any other type of speech. Even assuming that Nike's speech defending its labor practices was commercial speech under current doctrine, such speech is no different than a politician's defense of his or her own hiring practices, voting record, or personal indiscretions. In the latter instances, the politician is no less aware of the facts regarding his or her own personal behavior and may well be better able than a large and far-flung corporation to verify the truth of self-referential speech. By contrast, a corporation's need to rely on reports from a myriad of agents and employees processing and distilling huge volumes of information from around the globe makes it extremely difficult to speak with perfect and unassailable accuracy on complex issues such as labor practices, product safety, and the like. A commercial entity's ability to speak at all thus is severely compromised by the threat of litigation for any conceivable inaccuracy regardless of materiality, regardless of the speaker's efforts to ensure accuracy, and regardless of whether anyone even relied on the speech.

The "verifiability" excuse for lower protection is all the more troubling in that it is unnecessary and overbroad as a means of attacking commercial fraud. For commercial assertions that are indeed more readily verified by the speaker, it should be that much easier to prove an intentional or reckless

falsehood under standard First Amendment doctrine. And where the supposed absolute "truth" of a particular non-transactional statement on a commercial subject is *not* so readily determined, the justification for lower protection ceases to apply and the many reasons for protecting uncertain speech rise to the fore.

Hardiness. The second claim that profit-motivated commercial speech is hardier than other speech simply is not true as a logical matter. Profit motivation, for example, does nothing to distinguish commercial speech from a book written in the hopes that it becomes a best-seller. It does nothing to distinguish commercial speech from a movie or a television show that must capture the attention and interest of an audience in order to generate profits. And, indeed, it does nothing to distinguish *all* speech by corporate speakers, who are presumably motivated to speak out on any issue – be it their own products or some proposed legislation impacting their business – only because such speech furthers their corporate interests. As a means of justifying a lower level of protection for a particular category of speech, therefore, the hardiness argument proves far too much and creates indefensible inconsistencies in the First Amendment treatment of similarly situated speech.

Furthermore, the argument that profit-motivation leads to hardiness of speech is wrong even on its own terms. In fact, precisely because commercial speech is motivated by the prospect of economic return it is *more easily* deterred by threats to such return than is political or even artistic speech. In the noncommercial realm, speakers are often motivated by deeply held convictions, an internal drive to make a point, or the basic need for self-expression. Such speech is notoriously difficult to suppress even by direct means, as numerous protests, sit-ins, and even graffiti serve to demonstrate. Speech that is primarily driven by a profit motive, however, is especially easy to chill simply by imposing a penalty that exceeds the expected economic return of such speech. And the scales

tip more easily against speech where the expected economic return from the speech is low or indirect, and the economic consequences of even a meritless lawsuit are large. Given the often-slim profit margins that exist in competitive markets and the potentially devastating liability threatened by schemes such as California's, even the risk of litigation and liability will readily outweigh the economic value of large quantities of speech by corporations.

The inaccuracy of the "hardiness" argument is especially glaring once the definition of commercial speech is allowed to creep beyond the core of transactional speech. While it is true that proposing commercial transactions is necessary to do business at all, and thus will continue until the cost of such speech outstrips the profit margins of the speaker, other speech by commercial entities certainly is not *essential* to profits and hence will be more readily chilled. In Nike's case, for example, the company's Corporate Responsibility Report was in fact chilled because of the great imbalance between the potential return from such speech and the risk of litigation from even a completely truthful report. Pet. 28. And even for speech that might be thought directly relevant to sales transactions, the chilling effect will not be on the existence of such speech *per se*, but rather on its form. Corporations will be forced either to pare back their product descriptions to the bare minimum needed to complete any transaction while reducing or avoiding the risk of litigation, or they will load their speech with overwhelming qualifiers and disclaimers, rendering such speech largely useless as a genuine means of conveying information to consumers.[2]

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[2] The latter path creates the sort of information overload that can be seen in some pharmaceutical or consumer-product contexts. The purchaser is so flooded with unwanted information regarding trivial risks that it becomes virtually impossible to tease out the genuine risks. Rather, the more important speech gets lost in the noise of the trivial speech included only as a defense against overzealous litigation. Such overly qualified and

The hardiness excuse for diminished protection of commercial speech suffers from yet another flaw: Even assuming a decreased prospect of chilling certain commercial speech, that factor is already taken into account in the otherwise applicable *O'Brien* test. That test asks, among other things, whether the "incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of" the government's legitimate interest in regulating the intertwined conduct. 391 U.S. at 377. Insofar as a particular example of commercial speech is less likely to be chilled, the government would have more leeway in regulating intertwined conduct without imposing an excessive burden on First Amendment freedoms. But that determination should be made on a case-by-case application of the *O'Brien* test, just as it is for all other speech, and not via an inaccurate and illogical generalization about a broad category of so-called commercial speech.

Government Interest in Regulating Commercial Conduct. The third and final notion that government's authority to prevent commercial harms somehow alters its power over speech bound up with a commercial transaction is of dubious validity on several levels. The fact that government regulation has a valid goal surely has little or nothing to do with the level of scrutiny to be applied when the pursuit of that goal directly or indirectly burdens speech. While a legitimate goal of preventing commercial harms would surely be acceptable under the first part of the *O'Brien* test, there is no reason such a goal should also eliminate the remainder of that test. And as for the closeness of speech and the transaction that is the valid object of government regulation, that is the very situation for which the *O'Brien* test exists – intertwined speech and conduct.

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cautious discussion of important issues is the antithesis of the robust exchange of information and ideas contemplated by the First Amendment.

If the notion instead is that commercial harms are, as a category, somehow more important than other harms and therefore justify greater power to restrict speech, that notion is simply wrong on its face. The miscellaneous economic harms that might arise from erroneous commercial decisions based on genuinely false commercial speech surely are not even of the same magnitude as the harms that might arise from erroneous *political* decisions based on false speech. Political speech determines who runs the country, what laws are adopted, and whether the country goes to war. The impact of a misguided decision in any of those areas dwarfs the consequences of buying a set of sneakers based on a potentially mistaken view of Nike's labor policies.[3]

Furthermore, in the vast majority of instances where the government seeks to burden or restrict speech, there is little doubt that the harm the government seeks to prevent is well within its authority to address. The damage to reputation sought to be prevented or remedied by libel law, for example, is plainly a legitimate government interest no less valid than an interest in consumer protection, yet the First Amendment test is not diminished as a result. Likewise, the government's interest in avoiding violence from speech that might incite its listeners is of an extremely high order, yet the First Amendment is rigorous in its protection of speech that does not pose a clear and present danger of generating such unlawful conduct. In virtually every noncommercial instance of standard First Amendment analysis the government's interest plays a role only in the *application* of the relevant scrutiny, not in the alteration of the underlying standard itself. There is no sound reason that the government's interest in commercial matters should be any different.

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[3] And if commercial matters are deemed less important than political matters, there is no reason why the regulation of such concerns justifies a special exception to the usual protection afforded by the First Amendment to speech touching upon matters from the vital to the mundane.

By returning its focus to the core transactional speech that initially motivated the commercial speech doctrine, this Court would have no need for a separate and controversial doctrine based upon tenuous distinctions between commercial speech and other speech. Rather, the familiar *O'Brien* test is all that is needed to accommodate legitimate government interests, with other non-transactional speech by commercial speakers being accorded the same protection as the equivalent speech by anyone else.

C. Any Commercial Speech Doctrine Must Contain Limits to Protect Robust Public Debate.

Even if this Court declines to return commercial speech back to the main body of First Amendment analysis, the California Supreme Court's expansive definition of commercial speech sweeps in far more expression than is allowed by the First Amendment and is so uncertain in its boundaries that it generates an extensive penumbra of threat to protected speech. At a minimum, this Court should impose clear limits on the scope of what may be treated as "commercial speech" so that fundamental First Amendment interests in public discussion and debate are protected.

The California Supreme Court's categorizing as commercial speech virtually all "representations of fact about the speaker's own business operations for the purpose of promoting sales of its products," Pet. App. 1a, is shockingly broad and encompasses speech well beyond the specifics of this case. The statute itself, for example, applies to persons discussing anything related to the sale of any "property" or "services" by virtually any means whatsoever, including "public outcry or proclamation." Pet. App. 87a (CAL. BUS. & PROF. CODE § 17500). If the sale of "services" is no less commercial than the sale of products, then it would seem that all businesses, professionals, and even sports teams can be subjected to liability for what they say about themselves. Even employees and political candidates – selling the "services" of

their labor – are seemingly engaging in commercial speech by California's lights. And insofar as purchasing or investment decisions are thought to be made on the basis of the public's moral view of a company, then virtually *nothing* a company could say to the public would be immune from categorization as commercial speech.

Whatever the current application of the decision below, therefore, the line between commercial and noncommercial speech it creates is far "too elusive for the protection of" First Amendment freedoms. *Winters* v. *New York*, 333 U.S. 507, 510 (1948). The multiple factors relied upon by the court to distinguish between commercial speech and other forms of speech do not stand up to scrutiny, and hence offer no predictive security for future defendants. For example, the suggestion that a profit motive behind "advertising" justifies lesser protection, Pet. App. 12a, does not distinguish it from much other speech and hence leaves many speakers uncertain as to whether their speech is commercial. And whether speech has a purpose of promoting some eventual transaction, Pet. App. 1a, is an essentially meaningless factor in a world where consumer decisions can turn on a myriad of factors unrelated to the substance of the product or service itself, and hence virtually any speech could be alleged to relate to promoting sales.

The combined breadth and uncertainty of the definition of commercial speech adopted below thus poses an exceptional threat to speech both within and anywhere near the boundaries of California's liability regime.

While the best solution would be to eliminate any separate commercial speech doctrine, as suggested above, a less comprehensive step would be at least to confine the commercial speech doctrine to its core of speech that does nothing more than propose a commercial transaction. Such a limitation would not resolve all of the historical and logical problems with the commercial speech doctrine, but it certainly would tend to mitigate those problems and would be sufficient to reverse in this case.

Finally, if this Court is unwilling to entertain either the elimination or significant contraction of the commercial speech doctrine, an alternative means of confining that doctrine would be to emphasize certain clear elements that remove speech from the confines of the doctrine and return such speech to normal First Amendment treatment. The two elements that the Center proposes are (1) whether the speech involves a publicly debated issue and (2) whether the speech involves the character and operations of a public company. Drawing bright-line exclusions from the commercial speech doctrine for such speech would go a long way toward eliminating the uncertainty and chill that will result from the amorphous decision adopted by the court below.

Speech involving publicly debated issues, commercial or otherwise, plainly makes a "direct contribution to the interchange of ideas," *Virginia State Bd. of Pharmacy*, 425 U.S. at 780, and thus should be clearly excluded from the doctrine. That the debate over Nike's labor practices formed part of the larger debate on globalization and was discussed by both the news and editorial components of media entities throughout the country amply confirms that Nike's statements were not simply matters of private commercial concern. Similarly, given the ongoing public and legislative exchanges over corporate morality, character, and responsibility, discussions of company character and operations, as opposed to direct and immediate attributes of a product or transaction itself, should be excluded from down-categorization as commercial speech. Discussions of the character of public companies, like discussions of public figures in general, are far more likely to involve broader public issues for which the First Amendment seeks to guarantee robust public debate.

"The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield,* 507 U.S. at 767. Where the ideas and information in the commercial marketplace have in fact generated broader public debate within society and government as a whole, speech by commercial entities must

ernment as a whole, speech by commercial entities must be given an equal opportunity for robust expression within the marketplace of ideas.

Whether the commercial speech doctrine is eliminated in favor of the *O'Brien* test, narrowed to cover only core transactional speech, or merely is given the suggested clear limits regarding publicly debated issues and companies that are the equivalent of "public figures," Nike's speech in this case would not constitute commercial speech and should receive undiluted First Amendment protection.

II. CALIFORNIA'S SPEECH-LIABILITY REGIME SHOULD RECEIVE HEIGHTENED SCRUTINY REGARDLESS OF HOW THE SPEECH IS CATEGORIZED.

Assuming, *arguendo*, that Nike's statements constitute commercial speech generally subject to the less rigorous protections of the *Central Hudson* test, there are several aspects of California's speech restrictions that still justify elevated scrutiny. In this case, the speech-regulating regime approved below will create uniquely burdensome and nationwide injuries to First Amendment freedoms. Applicable to great swaths of expression, California's liability scheme eliminates fundamental procedural, substantive, and territorial protections that otherwise limit the burdens on speech imposed by more traditional causes of action. The removal of such protections simultaneously implicates the First Amendment and other, intersecting, constitutional concerns in the areas of due process, equal protection, and interstate commerce. The level of scrutiny thus should be increased regardless of the presumptive level of protection for commercial speech or any lesser scrutiny of restrictions on such speech in general.

A. First Amendment Due Process and the Elimination of Procedural Safeguards.

Acting on the premise that "governments may entirely prohibit commercial speech that is false or misleading," Pet.

App. 1a, the court below sanctioned a speech-liability scheme devoid of many procedural protections that serve to guard against burdensome yet easily made charges that speech is false or misleading. The absence of such protections means that even *fully protected* commercial and noncommercial speech will be plagued with difficult-to-dismiss claims, potentially crippling remedies, and years of litigation. The mere threat of such litigation will undoubtedly chill many speakers and will critically handicap public debate.

In this case, numerous traditional restraints on private claims that would otherwise mitigate the danger to speech have been discarded in favor of a single-minded effort to deter and suppress supposedly false or misleading speech. For example, the California speech regime effectively eliminates standing as a requirement to bring suit, allowing "any person" to sue on purported behalf of the "general public." Pet. App. 84a (CAL. BUS. & PROF. CODE § 17204). It abolishes any need to include "[a]llegations of actual deception, reasonable reliance, and damage," or to plead fraud with specificity. *Committee on Children's Television, Inc.* v. *General Foods Corp.*, 673 P.2d 660, 668, 669 n. 11 (Cal. 1983). And, consistent with a regime unrelated to actual consumer injury, a California court may impose massive financial penalties – misleadingly dubbed "restitution" – "without individualized proof of deception, reliance, and injury." *Id.* at 668; *see also Fletcher* v. *Security Pacific Nat'l Bank*, 591 P.2d 51, 56-57 (Cal. 1979) ("section 17535 authorizes restitution not only of any money which *has been acquired* by means of an illegal practice, but further, permits an order of restitution of any money which a trial court finds '*may have been acquired* by means of any * * * [illegal] practice.'") (emphasis altered).[4]

To prevent such a crippling chill, First Amendment jurisprudence incorporates various procedural protections in order

[4] In addition to such penalties, claimants may seek injunctions against speech, compelled speech, and attorney's fees. Pet. App. 4a.

to confine, predictably and consistently, any permissible speech restrictions to their proper and limited domains. *See Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (discussing intersection of due process and First Amendment); *see also Waters* v. *Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion) ("we have often held some procedures * * * to be constitutionally required in proceedings that may penalize protected speech"); *id.* at 686-87 (Scalia, J., concurring in the judgment) (agreeing that the "First Amendment contains within it some procedural prescriptions" at least for deprivations through the judicial process). Because it often can be hard to discern, *ex ante*, the substantive line between protected and unprotected speech, the First Amendment relies on various procedural devices to create the necessary "breathing space" for protected speech. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

Those procedural protections include heightened proof requirements, actual injury requirements, and scienter requirements for causes of action that would suppress speech. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277, 279 (1964) (discussing absence of criminal-law procedural safeguards in civil libel suits and then imposing on plaintiffs the burden of proving "actual malice" by the speaker); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (private figure plaintiff limited to actual damages where he fails to satisfy *New York Times* standards). Common-law limits on damages actions – such as standing and causation requirements – also serve to constrain the volume of litigation based upon speech, and hence mitigate the First Amendment dangers.

Furthermore, in the context of commercial speech, requirements such as standing, causation, and actual injury serve, either directly or indirectly, to tie any challenged speech closely with the underlying commercial transaction and harms, thus serving as an indirect assurance that the speech is indeed integrally related to a commercial transaction. Thus, not only do procedural limits perform a function

of protecting speech from spurious claims on the merits or from chill, they also serve a categorization function by helping to identify core "commercial" speech.

Procedurally protected breathing space is especially important where the basis for imposing liability is the alleged falsity of the speech at issue. Our Constitution, jurisprudence, and tradition have little faith in government processes to dictate the "truth": "[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945). We generally have been content to protect against the hazards of false speech with the tonic of competing speech, entrusting the public, rather than the government, to decide which of the opposing positions is true and which is false. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Such concerns are especially prominent where the alleged factual inaccuracies are bound up in a contentious and complicated debate about globalization that combines both fact, interpretation, opinion, and advocacy. Under those circumstances, even the attempt to excise supposedly separate "facts" from the debate in order to impose liability will inevitably burden the accompanying ideas and opinions as well. And, as this Court has observed, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.

The absence of so many traditional procedural safeguards in California's liability regime is compounded by California's extension of liability to *truthful* speech subsequently deemed to be misleading and by the absence of any meaningful scienter requirement. Such a trivial threshold for initiating and sustaining a suit multiplies the danger of suppressing protected speech and makes it exceptionally difficult to obtain pre-trial dismissal or summary judgment. It also increases the prospect of unanticipated liability for speech. Making liability depend on interpretations of the intent and effect of speech

> puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Thomas v. *Collins*, 323 U.S. at 535.

The net effect of California having abandoned so many traditional limits on speech-suppressing suits is that vast quantities of entirely truthful speech will be penalized and deterred. It will be easy to claim that speech is false or misleading in the context of contentious public issues that often have no black and white answers. Disagreements and conflicting interpretations are rife in such public debates, and much of the partisan advantage from a charge of falsehood – burdening one's adversary, chilling further speech – can be gained from the charge itself, regardless of the eventual outcome of the case.

Those consequences alone infringe upon First Amendment freedoms and require at least some heightened scrutiny. "Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer * * * wider of the unlawful zone,' * * * and thus 'create the danger that the legitimate utterance will be penalized.'" *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967) (citations omitted); *see also FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) ("that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities"); *First Nat'l*

Bank of Boston v. *Bellotti*, 435 U.S. 765, 786 n. 21 (1978) ("burden and expense of litigating" uncertain requirements would "unduly impinge on the exercise of the constitutional right" to free speech). Such First Amendment burdens exist independent of whether the legal regime is *targeted* at speech that ultimately may be regulated. *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965) (absent procedural safeguards for film censorship scheme that provided for prohibition of, *inter alia*, obscene films, "it may prove too burdensome to seek review of the censor's determination").

Whatever hardiness one might imagine inheres in commercial speech, such resilience will be overwhelmed by California's singular determination to make it easy to bring suit against speech on commercial topics. Furthermore, the elimination of so many procedural safeguards vastly expands the suppression not only of the supposedly commercial speech targeted by the liability regime, but also of noncommercial speech that is not covered – and that could not be covered – by California's restrictions. Because the procedural laxness of California's liability regime overwhelms the effect of a commercial characterization of the speech being targeted, heightened scrutiny is appropriate.

B. Speaker Discrimination and Equal Protection.

In addition to due process safeguards, the First Amendment incorporates Equal Protection Clause principles in order to provide a check against distortion of the marketplace of ideas and to guard against abuse of individuals and groups holding minority or disfavored views. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980).

California's speech-regulating regime involves just such discrimination "among speakers conveying virtually identical messages" and thus is "in serious tension with the principles undergirding the First Amendment." *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 194 (1999). There is no material difference, in terms of the interests behind California's unfair competition law, between the speech by petitioners in this case and the speech to which petitioners were responding. The anti-Nike criticisms were plainly targeted to consumers and others and were designed to influence purchasing and other decisions. They were no more difficult to verify, were more likely to create actual injury (to Nike), and were more likely to be relied upon by consumers, who are often skeptical of a company's denials of corporate wrongdoing. Yet speech by businesspersons and entities is subject to liability in California while identical or more problematic speech by others is protected.

Such discrimination is contrary to the well-recognized principle that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporate, association, union, or individual." *Bellotti*, 435 U.S. at 777; *see also Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 535 (1980) (limiting "the means by which [a corporation] may participate in the public debate on * * * controversial issues of national interest and importance," "strikes at the heart of the freedom to speak.").[5]

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[5] The discrimination between speakers also undermines the alleged state interests of protecting consumers and competitors and "promoting fair competition in commercial markets." Pet. App. 5a. The purported desire to serve those interests by purging commercial debate of falsehoods rings particularly hollow where California simultaneously leaves unregulated materially identical statements by Nike's critics that are equally or more likely to be false or misleading. California's "decidedly equivocal" approach to fairness and truth in the commercial marketplace of ideas and its failure "to adopt a single [state] policy that consistently endorses either

Many current issues now vigorously being debated involve conflicts between the business community and certain segments of the public. Criticisms of accounting practices, stock broker behavior, and globalization generally force businesses into defending themselves against attacks from business critics. (Even debates involving abortion sometimes involve providers of abortion services – business entities within the scope of California's liability regime – defending themselves against criticism from abortion opponents.) The California regime imposes a predictably anti-business bias on many pressing debates with the dangerous potential to distort public opinion and policy in an area already prone to political hay-making and a revived regulatory impulse. That imposed bias strikes at the combined concerns of both the First Amendment and the Equal Protection Clause, and thus warrants heightened scrutiny regardless of how the speech at issue might be characterized for First Amendment purposes alone.

C. Extraterritorial Burdens on Interstate Speech.

As with the intersection between the First Amendment and the Due Process and Equal Protection Clauses, there is likewise added concern – and greater scrutiny – where the First Amendment intersects with the Commerce Clause through a state's imposition of extraterritorial speech restrictions. In *Bigelow* v. *Virginia*, for example, this Court rejected a rule that would allow a state to exert power "over a wide variety of national publications or interstate newspapers carrying" similar speech because such a result "would impair, perhaps severely, the proper functioning" of the free exchange of ideas. 421 U.S. 809, 828-29 (1975). That Virginia had asserted an interest in protecting its own citizens was deemed insufficient when the means of protection was the functional assertion of "power or supervision over the internal

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interest," undermines the substantiality of its claimed interests. *Greater New Orleans Broadcasting*, 527 U.S. at 186-87.

affairs of another State." *Id.* at 824. Such extraterritorial assertions of power also are suspect in the particular context of commercial speech because they cast doubt on whether the speech being regulated is in fact so integrally related to a commercial transaction *in California* that it is properly categorized as commercial speech.[6]

In this case, California's speech-regulating regime has extensive extraterritorial application that would suppress speech not just in California but throughout the country. The speech California seeks to regulate in this case includes communications in numerous other states and in national publications, and was in response to similarly far-flung speech by Nike's critics. *See* Pet. App. 3a-4a (Nike statements in press releases, letters to editors and university officials, and paid newspaper advertisements); *id.* at 3a (criticisms raised on national television, in Financial Times, New York Times, Buffalo News, and Kansas City Star).

A core tenet of Commerce Clause jurisprudence is that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid." *Healy* v. *Beer Inst.*, 491 U.S. 324, 332 (1989); *see also Edgar* v. *MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality opinion) (state statute invalid because it "directly regulates

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[6] Furthermore, out of respect for both Commerce Clause and federalism concerns, where states other than California deem the speech at issue to be *noncommercial*, California's burden on such extraterritorial speech ought to be evaluated under normal First Amendment scrutiny rather than the lesser scrutiny provided for commercial speech restrictions. Such an approach would safeguard the decisions of those other states to protect non-transactional speech such as presented in this case. As petitioners pointed out, California's liability regime is unique throughout the country for its depth and breadth of regulation. Pet. 29. While the matter might be different if it were the Federal Government imposing uniform regulations on supposedly commercial speech – for then the Commerce Clause concerns would be absent – where there is an inevitable inconsistency between the speech regulatory regimes of different states, there should be heightened scrutiny of the more restrictive regimes.

transactions which take place across state lines, even if wholly outside the State"). Such a law is invalid "whether or not the commerce has effects within the State" and a state may not adopt "legislation that has the practical effect of establishing" rules of conduct "'for use in other states.'" *Healy*, 491 U.S. at 336 (citation omitted).

Just as "extraterritorial regulation of interstate commerce" squarely conflicts with the Commerce Clause, *id.* at 332, extraterritorial regulation of commercial speech conflicts with both the Commerce Clause and the First Amendment and thus constitutes an especially egregious constitutional affront. In this case, the effect of California's regime is effectively to regulate "commerce that takes place wholly outside of the State's borders," *id.* at 336, by establishing singularly rigorous minimum standards for business speech that will, by necessity, apply throughout the country. Those standards apply to speech occurring wholly outside California and between businesses and citizens of other states because of the near certainty that any such speech will eventually find its way into California through nationwide and global media sources. Any business wishing to communicate to the public anywhere in the country – or the world – thus will have to do so on California's terms.

Such a California-*über-alles* approach to regulation is simply unacceptable in an era of national and international communications. Just as the available reading material for adults cannot be reduced to that suitable only for children, *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957), so too in the commercial speech area, robust public debate throughout the country involving business practices and products cannot be sanitized to the degree apparently necessary for citizens of California. Citizens of all other states are more than willing to hear a robust debate on business issues and to take the constitutionally required risk of a potentially false or misleading exchange. They are willing to judge such matters for themselves as part of their decision-making processes when evaluating that debate, rather than cede judgment to the government via litigation that would inevitably squelch such debate. That California would make a different choice for its citizens offends the First Amendment even within that state. but it stands as a First Amendment abomination when imposed by California on the citizens of all other states.

California's extraterritorial regulatory regime would be invalid even were the targeted behavior purely economic activity. It thus is all the more improper where it operates in the constitutionally protected realm of speech. The combined offense of California's regime to both the First Amendment and the Commerce Clause at a minimum warrants higher scrutiny than if the case involved only First Amendment concerns alone. And under any level of scrutiny beyond that applied by the court below, the California regime would fail.

CONCLUSION

For the foregoing reasons, the decision of the California Supreme Court should be reversed.

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Dated: February 28, 2003.

Supreme Court, U.S.
FILED
FEB 28 2003
OFFICE OF THE CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* ON BEHALF OF THE ARTHUR W. PAGE SOCIETY, THE COUNCIL OF PUBLIC RELATIONS FIRMS, THE INSTITUTE FOR PUBLIC RELATIONS, THE PUBLIC AFFAIRS COUNCIL AND THE PUBLIC RELATIONS SOCIETY OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does corporate speech that is inextricably part of a vital debate about matters of public interest become "commercial" because, although it does not propose a commercial transaction, it may "maintain [corporate] sales and profits?"

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FEDERAL CASES	
Board of Trustees v. Fox, 492 U.S. 469 (1989)	13
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Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1 (1986)	18
R.A.V. v. St. Paul, 505 U.S. 377 (1992)	11
Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988)	13
FEDERAL STATUTES	
Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204 (2002)	9
UNITED STATES CONSTITUTION	
First Amendment	*passim*

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OTHER AUTHORITIES

5 Die After Taking Tylenol Believed to Contain Cyanide, NEW YORK TIMES, Sept. 30, 1982 14

AEI Conference on Productivity & the American Economy – Part 1 (C-Span television broadcast, October 23, 2002) 5

Speech by Steve Ballmer, CEO of Microsoft (C-Span television broadcast, November 12, 2002) 5

EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS (1999) 8

Peter Clarke, Address at SRI Media Conference (Nov. 2, 2002) 17

Columbia's School of International and Public Affairs Course Catalog, INAF U9178.001 "Human Rights and Corporate Responsibility" 9

Corporate Crises Have Long-Term Impact New Consumer Survey Finds, BUSINESS WIRE, Aug. 17, 1993 12

Al Frank, *No Comment = No Credibility*, STAR-LEDGER, Aug. 6, 2002 13

Steve Gosset, *Avoiding PR Disasters*, HARVARD MANAGEMENT COMMUNICATIONS LETTER (2001) ... 12

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Bonnie Harris, *In Fast Food, Some See Fast Track*, LOS ANGELES TIMES, Mar. 12, 2001 11

Harvard's John F. Kennedy School of Government Course Catalog, KSG BGP-232 "Business as a Political Actor" 9

Bob Herbert, *Let Nike Stay in the Game*, NEW YORK TIMES, May 6, 2002, at A21 9

http://www.awpagesociety.com/public/about/apabout/html (last visited Feb. 26, 2003) 3

Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 Bus. Law. 757 13-14

Tamar Lewin, *Tylenol Posts an Apparent Recovery*, NEW YORK TIMES, Dec. 25, 1982 14

MacNeil/Lehrer Report: Cyanide Investigation (PBS television broadcast, Oct. 1, 1982) 14

Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, SAN FRANCISCO CHRONICLE, Oct. 15, 2002 11

McDonald's Social Responsibility Report, available *at* http://www.mcdonalds.com/corporate/social/report/index.html (last visited Feb. 26, 2003) ... 12

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Leo Mullin, Delta Airlines, Chairman & CEO (C-Span television broadcast, September 25, 2002) 5

Newshour with Jim Lehrer: Bridging the Gap (PBS television broadcast, March 20, 1996) 5

Newshour with Jim Lehrer: High-Tech Workers (PBS television broadcast, April 3, 1998) 6

Newshour with Jim Lehrer: Megamerger Masters (PBS television broadcast, January 12, 2000) ... 5

Newshour with Jim Lehrer: Newsmaker: Phillip Knight (PBS television broadcast, May 13, 1998) 4

Newshour with Jim Lehrer: Return of Thalidomide (PBS television broadcast, August 4, 1998) 4

Newshour with Jim Lehrer: Sharing the Wealth (PBS television broadcast, January 6, 2003) 4

Pharmaceutical Innovation: the enabling conditions, *at* http://www.merck.com/overview/98ar/p6.htm (last visited Feb. 26, 2003) 7

Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PLI/Corp 307 15

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Precious Cargo, available *at* http://gm.com/company/gmability/safety/child_passenger_safety/precious_cargo/index.html (last visited Feb. 26, 2003) 6

Milford Prewitt, *Critics Slam Best-Seller Critique of QSR*, NATION'S RESTAURANT NEWS, Jun. 11, 2001 10

Protect Free Speech: A California Court Threatens a Vital Principle, FINANCIAL TIMES, Dec. 9, 2002 7

Speech by James Robbins, President and CEO, Cox Communications (C-Span television broadcast, October 22, 2002) 5

ERIC SCHLOSSER, FAST FOOD NATION (2001) . 6, 10, 11, 12

Regina Schrambling, *Catching America With Its Hands in the Fries*, NEW YORK TIMES, Mar. 21, 2001 11

Sandi Sonnenfeld, *Media Policy – What Media Policy?*, 8/1/94 HARV. BUS. REV. 18 (1994) 12

Therapeutic Cloning Under Fire *at* http://www.lef.org/magazine/mag2002/mar2002_cover_west_01.html (Mar. 2002) 15

Gary Young, *Nike Ruling: Just How Chilling Is It?*, NATIONAL LAW JOURNAL, Jan. 20, 2003, at A9 ... 16, 17

BRIEF *AMICI CURIAE* ON BEHALF OF THE ARTHUR W. PAGE SOCIETY, THE COUNCIL OF PUBLIC RELATIONS FIRMS, THE INSTITUTE FOR PUBLIC RELATIONS, THE PUBLIC AFFAIRS COUNCIL AND THE PUBLIC RELATIONS SOCIETY OF AMERICA IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*[1]

The Arthur W. Page Society, founded in 1983, is a professional organization with approximately 300 members consisting of chief corporate public relations officers of major companies, as well as other leaders in the public relations profession who are closely related to corporate public relations. Its goals are to strengthen the management policy role of the corporate public relations officer; develop knowledge of corporate management issues; educate the public about the role of public relations management; encourage research that leads to improvement in the corporate public relations function and to introduce these concepts to scholars, teachers and students.

The Council of Public Relations Firms represents the business of public relations and corporate communications. Its 120 member firms include all of the ten largest firms and over three quarters of the top 50 firms (measured by revenue) in the world. Together, *amici* and its members represent every facet of the public relations and corporate communications industry. The mission of the Council of Public Relations

1. Letters from both parties consenting to the filing of all briefs have been filed with the Clerk of this Court. Counsel for the *amici* were the sole authors of this brief. No person or entity other than *amici* made a financial contribution to this brief.

Firms is to advance the business of public relations by building the value of public relations as a strategic business tool, by helping its member firms set the standards for the profession and by promoting the benefits of careers in public relations.

The Institute for Public Relations, established in 1956 by a senior group of public relations professionals, is devoted to advancing the professional knowledge and practice of public relations through research and education. It has supported more than 200 research projects, ranging from what students of public relations must study in order to understand the profession to how new technologies affect the public relations profession, as well as sponsored numerous competitions and awards to reward excellence in the field.

Formed in 1954 at the urging of President Dwight D. Eisenhower, the Public Affairs Council is one of the leading associations for public affairs professionals. It provides unique information, training and other resources to its members to support their effective participation in government, community and public relations activities at all levels. Nearly 600 member corporations, associations and consulting firms work together to enhance the value and professionalism of the public affairs practice, and to provide thoughtful leadership as corporate citizens.

The Public Relations Society of America is the world's largest organization for public relations professionals. Its nearly 20,000 members, organized into 116 chapters, represent business and industry, technology, counseling firms, government, associations, hospitals, schools, professional services firms and nonprofit organizations. Chartered in

1947, its primary objectives are to advance the standards of the public relations profession and to provide members with professional development opportunities through continuing education programs, information exchange forums and research projects conducted on the national and local levels.

Amici counsel companies on the impact of their decisions and actions upon shareholders, employees, customers and other stakeholders. They also assist companies of all types to gather and disseminate information related to their businesses and communities on all conceivable topics, from investor relations, to philanthropic and community outreach programs, to corporate crisis communications. For decades, *amici* have relied on the First Amendment protections available to all speakers, regardless of their identity, to engage in robust public debate about issues of public concern without fear of the risk of strike suits. This protection has become even more vital over the last several decades, because, as Arthur W. Page[2] put it, it is increasingly true in the information age that "all business in a democratic country begins with public permission and exists by public approval." http://www.awpagesociety.com/public/about/apabout.html (last visited Feb. 26, 2003). Because the California Supreme Court's decision will have an unfair, unprecedented and materially chilling impact on the ability of companies and *amici* to speak on issues of public concern, *amici* urge the Court to reverse the judgment of the California Supreme Court.

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2. Arthur W. Page, who was the first chief corporate communications officer to sit on the board of directors of a major U.S. corporation (AT&T), is credited with having established the profession of corporate communications.

SUMMARY OF ARGUMENT

The California Supreme Court incorrectly held that claims asserted under California's unfair competition and false advertising laws on the basis of letters to the editor, press releases and other corporate communications may, consistent with the First Amendment, give rise to strict liability. It based this conclusion on its *sui generis*, three-part definition that "commercial speech" is any "representation[] of fact": (1) made by "commercial" speakers "engaged in commerce"; (2) to an audience that may include potential purchasers or that may report on the issue to potential consumers; (3) about a topic related to "business operations." *Kasky v. Nike, Inc.*, 45 P.3d 243, 247, 256 (Cal. 2002).

This new test creates an Orwellian preference for public debate bereft of facts. That result cannot be squared with the First Amendment.

This new test sweeps within its scope ***any*** factual statement, including letters to the editor and opinion editorials; statements published on web sites; media presentations; press releases; television appearances; appearances on the Newshour with Jim Lehrer[3]; C-Span

3. *See, e.g., Newshour with Jim Lehrer: Sharing the Wealth* (PBS television broadcast, January 6, 2003) (Mark Deem, Engineering Director of The Foundry, and other executives discussing how to account for stock options); *Newshour with Jim Lehrer: Newsmaker: Phillip Knight* (PBS television broadcast, May 13, 1998) (Phillip Knight, CEO of Nike, discussing Nike and globalization); *Newshour with Jim Lehrer: Return of Thalidomide* (PBS television broadcast, August 4, 1998) (John Jackson, CEO of Celgene, on the

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appearances[4]; indeed, ***any*** public statement made by a company about a topic related to what that company does. As a result, the press as a whole—from a newspaper's business section to CNN's Lou Dobbs and CNBC—will suffer a dearth of information because silence will become the prudent course of action for business executives and spokesmen.

This will result in the compelled self-censorship of an enormous amount of protected speech on important matters

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FDA's decision to give limited approval to Thalidomide and Celgene's possible marketing of the drug); *Newshour with Jim Lehrer: Bridging the Gap* (PBS television broadcast, March 20, 1996) (Aaron Feurstein, CEO of Malden Mills, discussing corporate responsibility and the wage-profit gap; using examples from Malden Mills); *Newshour with Jim Lehrer: Megamerger Masters* (PBS television broadcast, January 12, 2000) (Steve Case, CEO of America Online, and Gerald Levin, CEO of Time Warner, discussing the impending AOL Time Warner merger and how the consolidation was in the public interest).

4. *See, e.g.*, Speech by Steve Ballmer, CEO of Microsoft (C-Span television broadcast, November 12, 2002) (Mr. Ballmer discussed Microsoft's recently approved antitrust settlement with the Department of Justice); Leo Mullin, Delta Airlines, Chairman & CEO (C-Span television broadcast, September 25, 2002) (Mr. Mullin discussed the financial well-being of the airline industry and what must be changed in order for airlines to survive); Speech by James Robbins, President and CEO, Cox Communications (C-Span television broadcast, October 22, 2002) (discussing the cable industry); AEI Conference on Productivity & the American Economy — Part 1 (C-Span television broadcast, October 23, 2002) (a panel discussion on the economy including Dick Davidson, Chairman & CEO, Union Pacific Corporation; Marilyn Carlson Nelson, Chairman & CEO, Carlson Company).

of public concern because the issues also happen to touch upon the speaker's "business operations":

- Johnson & Johnson's swift public response to Tylenol cyanide tampering in 1982 would, under *Kasky*, expose it to strike suits, *see* pp. 13-15, *infra*;

- McDonald's could no longer effectively respond to critics such as Eric Schlosser and his book FAST FOOD NATION, *see* pp. 10-12, *infra*;

- Advanced Cell Technology and other companies would risk suit by entering the public debate on cloning, *see* pp. 15-16, *infra*;

- General Motors and other companies would run increased risks by commenting on the pros and cons of airbags for child safety.[5]

- Technology companies would incur litigation risks by discussing the need for "green card" quota increases to bring specialists into the United States.[6]

5. *See, e.g.*, Precious Cargo, available *at* http://gm.com/company/gmability/ safety/child_passenger_safety/precious_cargo/index.html (last visited Feb. 26, 2003) ("Another reason to restrain children properly, in a rear seat, is the vehicle's frontal air bags, which are designed to restrain adults. Air bags have to inflate very quickly, faster than a person can blink an eye, and with great force. Serious injury, and even death, can result for anyone—especially a child—who is up against, or close to, a frontal air bag when it inflates").

6. *See, e.g., Newshour with Jim Lehrer: High-Tech Workers* (PBS television broadcast, Apr. 3, 1998) (T.J. Rodgers, CEO of (Cont'd)

- Drug and biotech companies would have to rethink whether they can comment on the effect of the Food and Drug Administration approvals process on the flow of their new products to the market.[7]

This list obviously is not exhaustive. Because the *Kasky* test covers any utterance where consumers might be present or might be expected to receive the information through media outlets, corporate speech as we know it will disappear from every medium of communication with the public.

All of this strikes *amici* particularly hard. As a *Financial Times* editorial reported, "if companies face potentially devastating liability for speaking, their only alternative is to say nothing at all." *Protect Free Speech: A California Court Ruling Threatens a Vital Principle*, FINANCIAL TIMES, Dec. 9, 2002 at 22. As troubling as the *Kasky* decision may be for advertisers and advertising agencies, at least there is a well-developed body of law (federal and state) that provides guidance regarding when advertising is false and subject to litigation. No such rules exist for the corporate speech that

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Cypress Semiconductor, stating "We hire all the Americans we can get" but that green cards still needed for foreign engineers and specialists because there are not enough American engineers to keep pace the demand for expansion. Rodgers also stated: "I promise that every time I get one of those engineers I will create five more jobs right here in America for Americans to build and sell those products").

7. *See, e.g., Pharmaceutical Innovation: the enabling conditions, at* http://www.merck.com/overview/98ar/p6.htm (last visited Feb. 26, 2003) ("It is critical that the U.S. Food and Drug Administration approve safe and effective new medicines in a timely fashion, so that people who need them will get them as quickly as possible").

amici help create and disseminate because, prior to the California Supreme Court's decision, that speech correctly was considered to be fully protected, core speech regarding matters of public concern. This makes it difficult, if not altogether impossible, for *amici* and their clients to anticipate where the California courts will draw the line between "misleading" and non-actionable statements.

The *Kasky* decision inevitably will stymie public relations professionals' ability to assist corporations to maintain an open dialogue with the public and engage in the "uninhibited, robust and wide-open" public debate that was previously thought to be protected by the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Given the significance of this potential outcome, *amici* urge the Court to weigh heavily the likely consequences of the judgment of the California Supreme Court and reverse its erroneous decision.

ARGUMENT

I. FACTUAL CORPORATE COMMUNICATIONS ARE A VITAL COMPONENT OF UNFETTERED DEBATE ON MATTERS OF PUBLIC CONCERN

Corporate speech is vitally important to a functioning democracy. As corporations and the communities in which they reside and operate have become more closely linked over the past two decades, the public has come to expect a new level of civic engagement from corporations. *See* EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS xiv (1999) ("The public environment in which companies operate today . . . is far different than it was just 20 years ago. There are dramatic and far-reaching changes in the expectations of communities and societies today that define and influence

how a company can operate"). Public relations professionals facilitate this interaction between the public and companies by providing factual information on topics of interest to both groups. Indeed, the public has made clear that its preference is for more openness and communication from companies, not less.[8] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (instituting several measures designed to increase corporate transparency).

That corporate speech and advocacy play a significant role in informing public debate and shaping public opinion and policy is beyond dispute. Government schools now recognize the increased role of and expectations for business in American democracy by offering courses in this area. *See* Harvard's John F. Kennedy School of Government Course Catalog, KSG BGP-232 "Business as a Political Actor" (describing course designed to analyze the important role that "[b]usinesses play . . . in the public policy processes of capitalist democracies"); *see also* Columbia's School of International and Public Affairs Course Catalog, INAF U9178.001 "Human Rights and Corporate Responsibility" (describing course designed to analyze the "complex questions arising out of the interaction of business activities and human rights. . . .").

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8. Even one of Nike's most vocal critics has subsequently stated "[w]hatever one thinks of Nike, it is a crucial participant in this continuing debate." Bob Herbert, *Let Nike Stay in the Game*, NEW YORK TIMES, May 6, 2002, at A21.

II. PUBLIC RELATIONS ACTIVITIES THAT MAKE IMPORTANT CONTRIBUTIONS TO PUBLIC DEBATES WILL BE CHILLED BY *KASKY*

For decades, corporate and non-corporate speech on the same topics have appeared together in all of the media traditionally associated with First Amendment purposes: (a) editorials and letters to the editor; (b) paid-for advertised editorials in newspapers, magazines, and other publications; and (c) appearances on news shows and at other public forums. Often, as is the case here, corporations speak out to respond to critical speech. Whether by design or because of lack of access or resources fully to research the issue, such criticism often leaves out important facts vital to a comprehensive presentation of the issues involved.

For example, in 2001, Eric Schlosser published FAST FOOD NATION, a best-selling social-cultural critique of the fast food industry. The book criticized several aspects of the fast food industry, such as: its contribution to low-wage, unskilled jobs; its role in the dramatic increase in rates of obesity; and, its role in the homogenization of American neighborhoods. *See* Eric Schlosser, FAST FOOD NATION 3-10 (2001). Although the book criticized the industry as a whole, it focused in large part on the practices at McDonald's. Faced with a damning critique of all facets of its business, McDonald's vigorously argued the book provided an incomplete picture. *See, e.g.*, Milford Prewitt, *Critics Slam Best-Seller Critique of QSR*, NATION'S RESTAURANT NEWS, Jun. 11, 2001, at 4 ("The real McDonald's bears no resemblance to anything described in that book. The author is wrong about our people, wrong about our jobs and wrong about our food. He also completely ignores our values, which is not surprising since he never contacted us for any information whatsoever"). Other

reviewers also questioned the accuracy of the account. *See* Regina Schrambling, *Catching America With Its Hands in the Fries*, NEW YORK TIMES, Mar. 21, 2001, at F1 ("Some reviewers have accused Mr. Schlosser . . . of playing fast and loose with the facts").

In order to fill the gaps that it felt were missing, McDonald's engaged in the traditional response—counter-speech of its own—to present a fuller account of its business. *See, e.g.*, Bonnie Harris, *In Fast Food, Some See Fast Track*, LOS ANGELES TIMES, Mar. 12, 2001, at C1 (describing how many Latinos view McDonald's and other restaurant chains as a key to long-term financial security, and quoting McDonald's spokesman Walt Riker as stating, "We've always disputed the idea that fast-food jobs are dead-end jobs, and our Hispanic workers are evidence of that. We value their work, and we're continuing to encourage their advancement through training and other programs"); *see also* Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, SAN FRANCISCO CHRONICLE, Oct. 15, 2002, at A1 (in response to criticisms that McDonald's encourages obesity, McDonald's spokeswoman pointed out that it was the first major fast food restaurant to introduce salads and reduce the fat content of its products).

Until the California Supreme Court's decision, a corporation like McDonald's right to defend itself and its shareholders from criticism and to present a complete record was grounded on the same unfettered First Amendment protection that the critic enjoyed. In granting critics First Amendment protection in attacking a company while simultaneously denying that same protection to the company in responding to those allegations, the *Kasky* decision impermissibly favors speech from a particular viewpoint. *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Indeed, McDonald's response to FAST FOOD NATION graphically illustrates

the unworkability of the *Kasky* test; literally every statement McDonald's made in response—no matter what the issue—concerned its "business operations," because that is precisely what the book attacked.[9]

Under the *Kasky* regime, however, McDonald's choice is either to stay silent or risk a potential suit for defending itself publicly. The adverse consequences of silence, however, are quite substantial. Not only does silence deprive the public of important information to contextualize debates, it creates a public presumption of either stonewalling or guilt. For that reason it long has been standard communications strategy that a "no comment" is just about the worst comment a corporation can make. *See, e.g.*, Sandi Sonnenfeld, *Media Policy — What Media Policy?*, 8/1/94 HARV. BUS. REV. 18, 20 (1994) ("There was a time when 'no comment' meant simply 'no comment.' But today when a company spokesperson says 'no comment,' it implies that the organization has something to hide"). Indeed, the public often perceives the "words no comment . . . as guilt." Steve Gosset, *Avoiding PR Disasters*, HARVARD MANAGEMENT COMMUNICATION LETTER (2001).[10]

9. In responding to the concerns raised by FAST FOOD NATION, McDonald's has made numerous factual statements concerning its "business operations." *See, e.g.*, McDonald's Social Responsibility Report, available *at* http://www.mcdonalds.com/corporate/social/report/index.html (last visited Feb. 26, 2003) ("Employees are respected and valued"; "Employees receive work experience that teaches skills and value that last a lifetime"; "Pay is at or above local rate in marketplace").

10. *See also Corporate Crises Have Long-Term Impact New Consumer Survey Finds*, BUSINESS WIRE, Aug. 17, 1993 (citing study of over 1,000 respondents conducted by national public relations agency finding nearly two-thirds of those questioned took

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The *Kasky* decision also creates a false dichotomy between fact and opinion and suggests that corporate statements on issues of public concern can receive First Amendment protection only if they are pure ***opinion***, a false dichotomy that makes the decision even more unworkable. *See, e.g.*, *Board of Trustees v. Fox*, 492 U.S. 469 (1989); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). This element of the *Kasky* decision strikes at the heart of *amici's* business because companies look to *amici* to maintain open lines of communication with the public. *Amici* assist in researching fully the facts surrounding a given issue and design strategies efficiently to deliver this information to the public. The importance of this free flow of factual information cannot be overstated.

It is difficult to imagine a more profound example of the public benefits of unfettered corporate speech than Johnson & Johnson's response to the Tylenol cyanide crisis. In the fall of 1982, seven people died from ingesting cyanide contained in tampered Tylenol capsules. In the hours following the first news of the crisis, Johnson & Johnson made the crucial decision to communicate everything it knew to the public. As George Frazza, Johnson & Johnson's General Counsel at the time, stated: "[w]e decided we were going to communicate, to be active . . . We were determined to find out what the facts were, and whether we liked them or not, communicate them without gloss to all of our constituencies." *See* Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product*

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"no comment" as a signal of guilt); Al Frank, *No Comment = No Credibility*, STAR-LEDGER, Aug. 6, 2002 (citing study by Hill & Knowlton and Opinion Research Corp. finding that 62% of respondents equated "no comment" with guilt).

Liability Considerations, 39 BUS. LAW. 757, 767 (1984). As a result, Johnson & Johnson maintained an open dialogue with the press and public throughout the crisis. *See, e.g.*, *5 Die After Taking Tylenol Believed to Contain Cyanide*, NEW YORK TIMES, Sept. 30, 1982 at A12 (Lawrence Foster, a Johnson & Johnson spokesman, describing what information had been learned from authorities and Johnson & Johnson's method of distribution); *see also MacNeil/Lehrer Report: Cyanide Investigation* (PBS television broadcast, Oct. 1, 1982) (Dr. T.N. Gates, medical director of Tylenol, appearing as one of the guests and discussing the manufacturing and distribution of Tylenol in the context of the cyanide crisis).

Johnson & Johnson's forthrightness with the public saved not only the Tylenol brand and perhaps even Johnson & Johnson itself, it contributed to the way American consumer goods are packaged and labeled to be tamper-resistant. *See* Tamar Lewin, *Tylenol Posts an Apparent Recovery*, NEW YORK TIMES, Dec. 25, 1982 at A30 (quoting a market researcher's conclusion that Johnson & Johnson's recovery due to "forthright manner" in dealing with the public during the Tylenol crisis). *Kasky*'s regime of strict liability, however, would inhibit such open communication. Under *Kasky*, if a company makes a broad statement or unintentionally publishes incorrect information concerning its distribution practice (undeniably part of its "business operations"), the proscribed corrective action is so punitive that it may dissuade companies from communicating in the first place.[11]

11. During the cyanide crisis, Johnson & Johnson made multiple statements about its "business operations" that would potentially be a basis for liability under *Kasky*. *See, e.g.*, *McNeil/Lehrer Report: Cyanide Investigation* (Dr. Gates' comments that "We are confident . . . that our security, our quality assurance procedures are such that

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The harsh results of suppressing this openness are difficult to overstate: Johnson & Johnson's swift public communications literally are credited with saving human life. Of the eight million capsules recalled after Johnson & Johnson began its campaign, seventy-five were found to contain cyanide. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PLI/Corp 307, 309.

Debates on some of the most important issues of our time have been shaped and influenced by corporate speakers and public relations professionals such as *amici*. One such debate centers on scientific advances in the field of medicine, and the ethical issues those advances raise, for example, the science of cloning and the possible medical uses for the technology associated with it. As such advances came to the public's attention, a vigorous debate ensued concerning the ethical implications of these scientific discoveries. *See* "Therapeutic Cloning Under Fire" *at* http://www.lef.org/magazine/mag2002/mar2002_cover_west_ 01.html (Mar. 2002) ("when he [Advanced Cell Technology's ("ACT") CEO Dr. Michael West] announced recently that ACT had taken the first step towards human therapeutic cloning, he was suddenly criticized by everyone from President Bush to the Pope").

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this could not have happened in the process of the packaging — manufacture and packaging of the product"; "We do have cyanide in our analytical laboratories because it is required for certain tests . . . But it would not be in any way accessible to the manufacturing process"; "Well, we're shocked, we're dismayed, we've learned that medications can be tampered with at the, we believe at the retail level").

Corporations that have a financial interest in cloning technologies have joined the public debate to add a unique perspective on the issue. ACT itself, which initially made the scientific breakthrough making cell cloning possible, has taken a diametrically opposed view to cloning's critics. *See id.* ("No serious ethicist or embryologist believes that a pre-implantation embryo is a human being. We are not talking about creating a pregnancy. We are talking about making a microscopic ball of cells with no body cells of any kind"). It is precisely these representations about ACT's cloning process, especially in the form of the robust analogies used by Dr. West, that would become fodder for strike suits (as well as suits brought by political advocacy groups opposed to human cloning).

III. THE *KASKY* TEST COVERS AN ENORMOUS AMOUNT OF PROTECTED CORPORATE SPEECH

As disparate as the public statements described above may be, they all share characteristics that illustrate why this Court should reverse the California Supreme Court's decision: (1) all concern issues of great public moment; (2) all involved the dissemination of facts related to the company's "business operations"; and (3) the corporations involved all stood to benefit financially as a result of the speech, even though many of the public statements also were made in part to affect legislation, promote public safety and/or affect other regulation. If the *Kasky* decision stands, however, these communication efforts will be subject to a new strict liability standard that will incentivize critics not to respond with more speech, but class action lawsuits.[12]

12. One observer has noted that already the number of U.S. companies publicly issuing corporate responsibility reports has (Cont'd)

The amorphous nature of the test also means that, as a practical matter, there is no guidance for *amici* or others to determine what corporate speech is entitled to First Amendment protection. The broad language of the *Kasky* decision creates an illusory distinction between "policy" discussion and commercial speech, which the California Supreme Court now defines as any statement about "actual conditions and practices" of the business. This distinction is unworkable in practice. The end result is that the test contains no limiting principles because it falsely assumes that because a corporation always is, in part, motivated by profits, its speech is entitled to no First Amendment protection. This is at odds with the Court's well-settled precedent. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (speech is entitled to full First Amendment protection notwithstanding it is undertaken by "large-scale business conducted for private profit"). The risks under the *Kasky* regime are even greater because *amici* often do not control the final presentation of press releases and other communications to the public, the media does. *Cf. Kasky*, 45 P.3d at 256 (statements made to reporters that are passed along to

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dropped from 78 in 2001 to 58 in 2002. *See* Gary Young, *Nike Ruling: Just How Chilling Is It?*, NATIONAL LAW JOURNAL, Jan. 20, 2003, at A9; *see also* Peter Clarke, Address at SRI Media Conference (Nov. 2, 2002):

> Many, many funds in Europe screen on social, environmental and other issues . . . For example, the Dow Jones Sustainability Index, the FTSF4 Good Index, and Euronext are actual stock market indices comprised of companies that are considered to be more socially responsible . . . The California decision might create a pretext for those companies to hide behind that decision so as not to go forward and publish their CSR reports.

consumers can be commercial speech). Prudent, risk-averse companies will have no option but to decline speaking in order to avoid the possibility of strike suits.

Indeed, for those corporations who enter the public debate, California's broad remedies impose another, even more chilling threat. That law provides as a remedy for speech that, even though true on its face, may mislead some, a "Court-approved public information campaign" to compel a corporation to "correct" editorials and other speech on matters of public importance. *Kasky*, 45 P.3d at 250. In other words, under the California Supreme Court's test, not only would the corporation's speech be subject to a stricter standard of liability than the speech of its critics, but the company could be compelled to finance a "public-information campaign" entirely against its interest to address potential "confusion" on the public's part.

This is fundamentally at odds with the governing principles of the First Amendment. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (California Public Utilities Commission's order that PG&E permit the "extra space" in its envelopes sent to customers to be used by a public interest group to voice a point of view PG&E did not agree with held to violate PG&E's First Amendment right not to speak). It inevitably will result in a lopsided debate dominated by corporate critics, bereft of facts that reside exclusively with corporations. The consequences to a fully informed public are difficult to overstate, as Johnson & Johnson's life-saving Tylenol campaign graphically demonstrates.

In short, because corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, no responsible corporate spokesman speaks on a company's behalf

without being concerned about the effects the statements may have on corporate sales and profits. Because all corporate speech is, and should be, uttered in the interests of benefitting the corporation in the eyes of potential consumers, the speech restricting effects of the California Supreme Court's test will be enormous.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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Supreme Court, U.S.
FEB 28 2003

No.02-575

In the Supreme Court of the United States

NIKE, INC., *ET AL.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

Whether speech by a manufacturer or producer that responds to an attack on its product or participates in debate on a matter of public concern may nevertheless be classified as commercial speech, and deprived of full First Amendment protection, because it is economically motivated or because it concerns the utility or safety of the speaker's product.

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

It is not uncommon for members of the NAM to find that the utility, safety, or healthfulness of products they manufacture has come under public attack. In such instances, they often desire to defend their products by bringing to the public's attention information that will illuminate the public debate and counter what the manufacturer believes to be unwarranted or unsubstantiated accusations. However, the threat of sanctions for speech later found – not necessarily reliably – to have been inaccurate is bound to chill the manufacturer's participation in the public debate, leaving that debate unfairly and misleadingly one-sided. It is important that this Court guard against such undesirable effects by recognizing that a manufacturer's defense of the utility, safety, or healthfulness of its products, when that has become a topic of public concern, is to be accorded full First Amendment protection.[1]

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of amicus briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, Nike's foreign manufacturing practices were challenged, and the company responded by issuing various statements explaining and defending its practices. In many other instances, the utility or safety of a manufacturer's product is attacked by consumer groups, investigative reporters, or others, and the company would wish to respond and place before the public its side of the controversy. The thesis of this brief is that, when a manufacturer is responding to a public attack on its product or the product is otherwise the focus of public debate or controversy, the manufacturer's statements are due the same full First Amendment protection as those of its critics. The reduced protections afforded to commercial speech are insufficient to prevent substantial chilling of useful speech by manufacturers that would, if not inhibited, inform and enrich the public debate.

1. At the outset, the test adopted by the Supreme Court of California for distinguishing between fully protected speech and less protected commercial speech is unacceptable. It effectively discriminates against expression on matters of public importance for no reason other than that the speaker is acting from economic motivations. Such an approach contradicts this Court's established standard for determining whether expression is commercial or non-commercial. In no other context of First Amendment jurisprudence has a speaker's motivation, standing alone, reduced the level of constitutional protection given to expression. Because the lower court's approach conflicts directly with the standard adopted by this Court in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), for defining commercial speech, and because it is inconsistent with established First Amendment jurisprudence in regard to speaker motivation, it must be rejected.

2. At the same time, it is important that this Court not adopt as its basis for reversal the narrow and artificial ground

that Nike's speech did not directly concern either the quality or safety of its product. Much speech by a manufacturer or producer about its products constitutes an important contribution to debate about matters of public importance – every bit as much as did Nike's communications here. Such expression cannot be subjected to the type of regulation embodied in the California statute without unduly trenching on First Amendment values.

To provide only the reduced level of commercial speech protection to a company's defense of one of its products when that product is the focus of a public debate would (1) deprive the public of potentially valuable information and opinion about that issue by chilling corporate speakers, (2) unconstitutionally discriminate against one side of a public debate, and (3) effectively undermine this Court's conclusion that corporations possess "the full panoply of protections available to its direct comments on public issues." *Bolger*, 463 U.S. at 68.

Were all manufacturer or producer speech about product attributes automatically to be deemed commercial speech, the negative impact on the interests of free expression would be both direct and severe. Fear of sanctions would cause prudent manufacturers to engage in self-censorship or simply to refrain from any controversial expression, lest they unwittingly expose themselves to sanctions. In addition, it would constitute viewpoint discrimination of the worst sort. Under such a constitutional framework, Ralph Nader would receive full First Amendment protection when attacking the safety of General Motors' automobiles, yet General Motors' response would receive only commercial speech protection. Similarly, those who denounce as sham the claim that Vitamin C reduces the risk of disease could speak with impunity, while orange growers' contributions to the debate could be strictly scrutinized for accuracy. These examples are merely illustrative of countless public debates that focus on the quality or safety of a product.

Any rule that creates such imbalance between the opposing sides of a public controversy is unacceptable. It would amount, in the words of this Court, to licensing "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992). For these reasons, a manufacturer's commentary about the characteristics of its products is not classifiable as commercial speech simply by virtue of its subject matter. Rather, when the manufacturer is responding to a public attack on a product or the product is otherwise the focus of public debate or controversy, the manufacturer's statements are entitled to the same full First Amendment protection as those of the product's critics.

3. Recognition of this principle would not unacceptably undermine government efforts to control false and misleading speech. Most of what has traditionally been classified as commercial speech simply proposes a commercial transaction and does not constitute debate on any issue of general public importance. Such commercial solicitations can continue to be regulated in the manner and to the extent that the Court concludes is appropriate for speech classified as "commercial." While there will of course remain a borderland in which classification is difficult, appropriate tests can be developed that are responsive to the paramount need to promote robust, uninhibited debate on issues of public importance.

ARGUMENT

I. THE LEVEL OF CONSTITUTIONAL PROTECTION AFFORDED TO SPEECH ON PUBLIC ISSUES IS NOT REDUCED SIMPLY BECAUSE THE SPEECH IS ECONOMICALLY MOTIVATED.

A. The California Supreme Court's Test For Determining The Presence Of Commercial Speech Directly Conflicts With The Standard Announced By This Court In *Bolger*.

The California Supreme Court adopted a test for determining whether speech is commercial that refers to three factors: (1) the presence of "a commercial speaker"; (2) "an intended commercial audience"; and (3) "representations of fact of a commercial nature." Pet. App. 21a-22a. On closer examination, these three factors effectively resolve into a focus on a single factor: the speaker's economic motivation. When the speech in question is made by a commercial speaker to a commercial audience about commercial facts, it is reasonable to assume, as a categorical matter, that that speech will be motivated by the economic desire either to increase or to prevent a reduction in sales.

The California court's standard makes no reference to two of the three key factors identified by this Court in its test for determining whether regulated expression is properly classified as commercial speech: the use of the advertising form; and specific reference to a product. *Bolger*, 463 U.S. at 66-67. Instead, the lower court's test focuses exclusively on the extent to which the speech in question is motivated by the speaker's desire to increase sales – *i.e.*, the presence or absence of an economic motivation for the expression. This rationale is untenable, and was rejected by *Bolger* itself. See 463 U.S. at 67 ("the fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech").

In no other First Amendment context has this Court reduced the level of constitutional protection given to speech solely on the basis of a speaker's motivation. See, *e.g.*, *Hustler Magazine* v. *Falwell*, 435 U.S. 46, 53 (1988) (constitutional protection of public discourse does not depend upon the motivation for the expression). Indeed, it is generally unquestioned that expression motivated exclusively by considerations of personal gain receives full First Amendment protection. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) (fact that New York Times was paid for advertisement held to be irrelevant to level of First Amendment protection). For example, no one could reasonably argue that expression by social security recipients urging an increase in their benefits or speech by taxpayers (including corporate taxpayers) urging a tax cut is not fully protected speech. While the taxpayer's motivation is financial and the manufacturer's is commercial, for constitutional purposes that difference is inconsequential: in both situations, the speaker's motivation is personal financial gain. Thus, logic does not support, nor precedent compel, giving reduced constitutional protection to expression solely because the speaker seeks a commercial benefit.

B. Reducing Speech Protection Exclusively On The Basis Of Economic Motivation Would Cause Serious Harm To First Amendment Interests.

Reduction of the protection given to speech solely because of the presence of an economic motivation would result in serious harm to the values served by the constitutional protection of expression. A manufacturer or producer whose product has been criticized is often in a position to convey to the public valuable information relating to that criticism that may well be unavailable from other sources. If such expression is given only the reduced protection enjoyed by commercial speech, it would mean that it would lose First Amendment protection in the event of a subsequent finding that it was false. *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). The result would be a chill on manufacturer speech because of the natural fear that, whatever the manufacturer's understanding at the time, a future fact-finder could conclude that the speech was inaccurate or misleading. Such chilling would deprive society of the benefit of a more fully informed public debate.

Avoidance of such a chill was this Court's fundamental goal in providing speech on matters of public importance the "breathing space" necessary to prevent "the pall of fear and timidity" that otherwise might affect speakers. *New York Times*, 376 U.S. at 272, 278. As *New York Times* makes clear, the minimization of such chilling effects is among the most important ends to be promoted by First Amendment protection.

The suggestion in the opinion below (Pet. App. 20a) that the profit-making incentive and the comparative ease of verification make economically motivated expression relatively immune to chill by the fear of possible future liability is inaccurate. Economically motivated expression is no less likely to be chilled than a wide range of other speech motivated by considerations of personal gain, most of which unquestioningly receives full First Amendment protection. For example, a political candidate – much like a profit-making corporation – naturally possesses an inherent incentive to speak, if only to facilitate his or her election. Yet the candidate's expression of course receives full First Amendment protection. The same could be said of other financially interested groups, such as labor or taxpayer organizations, both of whose expression is fully protected.

It is certainly true that a manufacturer has built-in incentives to promote its products in one way or another. But as an economic entity, a corporation is at the same time strongly motivated to reduce financial risks as much as possible. Indeed, many companies employ risk managers whose specific job is to keep the company from engaging in risky conduct.

Thus, while there can be little doubt that manufacturers wish to promote their products, that does not make them immune to concerns about future liability. Such concerns are bound to influence what the manufacturer chooses to say about its products. Constraining forces will be especially powerful where defense of a product requires the making of possibly controversial statements – statements that, if made, may ultimately be seen to have been both fully accurate and highly beneficial in helping the public to reach sound conclusions on important but controversial subjects.

This conclusion is nothing more than a sensible recognition that, despite significant incentives to speak, the risk of sanctions for inaccurate or misleading speech will necessarily give *any* speaker pause. The result will often be to silence even well intentioned and subjectively honest expression, because of uncertainties about how that expression will later be judged by a fact-finder in which no rational prospective speaker can have complete confidence. The price that this chilling effect exacts on the public debate is one our society is not, and should not be, willing to pay, whether or not the speaker's motive is economic gain. Indeed, in *New York Times* this Court extended First Amendment protection to the defendant for fear of chilling expression, even though the challenged expression appeared in the form of an advertisement for which the newspaper had been paid. 376 U.S. at 265. This Court thus recognized that a speaker may be chilled by the threat of regulation despite the presence of a profit incentive for the speech.

As for ease of verification, it is simply not true that the accuracy of statements made with economic motivations is categorically easier to verify than that of statements that are not economically motivated. Indeed, when scientific or pseudo-scientific issues are advanced to challenge the safety or efficacy of a product, that very fact suggests that both sides of the debate may have reason to be unsure that their contentions are unimpeachably correct. In such circumstances, the speaker may honestly believe that the statements it wishes to make are accurate, yet genuinely fear that others in the future could come to different conclusions.

Finally, to reduce the level of constitutional protection on the basis of economic motivation will often result in unacceptable viewpoint discrimination in the degree of constitutional protection afforded the different participants in the debate. This will be so whenever only those on one side of the debate possess economic motivation, as in the not-infrequent situation in which those challenging the commercially motivated speaker are self-described consumer advocate groups. See, *e.g.*, *R.A.V.*, 505 U.S. 377; *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

II. EXPRESSION BY A MANUFACTURER ON A MATTER OF PUBLIC CONTROVERSY SHOULD NOT RECEIVE DIMINISHED PROTECTION BECAUSE IT FOCUSES ON CHARACTERISTICS OF THE PRODUCT.

A. The Outcome Of This Case Should Not Turn On The Fact That Nike's Speech Did Not Directly Concern Characteristics Of Its Product.

In *Bolger,* this Court indicated that three factors were to be considered in deciding whether to classify speech as commercial: (1) the use of the advertising form; (2) a specific product reference; and (3) the presence of economic motivation. 463 U.S. at 66-67. While none of these factors, standing alone, was deemed sufficient to classify speech as commercial, "[t]he combination of *all* these characteristics * * * provides strong support for the * * * conclusion that the [expression is] properly characterized as commercial speech." *Id.* at 67 (footnote omitted) (emphasis in original). Though the specific question was not before this Court at the time, the Court should now make clear that this three-factor test is not applicable to product-related corporate expression

when characteristics of a product are the focus of a public debate and the corporate speech is part of that debate.

This principle carries particular force when the manufacturer is responding to public attacks upon the safety or efficacy of one of its products. In such circumstances, it is both unwise and unfair to saddle the manufacturer's defense with the prospect of strict liability for misstatements, rather than permitting the truth to emerge in the crucible of vigorous, uninhibited public debate. Indeed, this Court's simultaneous and explicit recognition in *Bolger* of a corporation's "full panoply of protections" (463 U.S. at 68) for its comments on public issues appears to make such a conclusion obvious. Still, this case provides an important opportunity to resolve any uncertainty inhering in *Bolger*'s discussion of the issue and to provide the necessary guidance to the lower courts, which must deal with these questions in the first instance.

As noted in the preceding section, the test adopted by the Supreme Court of California for identifying commercial speech is facially inconsistent with the standard promulgated by this Court in *Bolger*, as well as with this Court's more far-reaching First Amendment jurisprudence concerning the role of motivation in determining the level of constitutional protection for expression. While the ruling must therefore be reversed, it is important that the basis for reversal not be confined to the narrow and artificial ground that petitioner's speech did not concern the quality, performance or safety of one of its products. Such a narrowly based decision could carry with it the implication that when corporate speech does, in fact, concern a product, it will for that reason be classified as commercial speech, regardless of the context in which it is made. Such an outcome would be incompatible with First Amendment interests.

Products themselves often provide the focus of an important and current public debate. Some examples include: the effect of oat bran, dairy products or beef on heart health; the

extent to which the Vitamin C in citrus fruits cures colds; whether certain automobiles were subject to sudden unexplained acceleration; whether microwaves from cellular phones cause brain tumors; whether low-tar cigarettes are safer; and the health effects of fast food.

When, as in these and a host of other circumstances, characteristics of a product are at the center of a public debate, treatment of manufacturer or producer speech on the subject as inherently commercial, and therefore sanctionable if found to be inaccurate or potentially misleading, would undermine fundamental precepts of First Amendment doctrine and theory. Indeed, the effect would be little different from the California Supreme Court's equation of economically motivated expression with commercial speech. In short, the very same reasons for refusing to rely upon motivation to classify petitioner's expression as commercial speech apply with equal force to a corporation's speech about one of its products when that product is at the center of a public debate.

First, where the product's quality or safety is the subject of controversy, there is bound to be a serious chilling effect if producer speech about the product receives only the reduced protection afforded commercial speech, especially in today's world of huge tort verdicts for a vast range of alleged corporate misconduct. This inhibition of corporate defense of its products is bound to impoverish the public discourse, depriving society of valuable information and opinion on matters of public importance. Frequently, because of its special incentives and resources, the manufacturer or producer will possess knowledge about the qualities of its products that no other participant in the debate is in a position to provide.

It is true, of course, that a manufacturer or producer could not be deemed an objective observer about its products, but free speech is not limited to disinterested commentators. Indeed, in no other context has the level of First Amendment

protection depended on whether or not the speaker is self-interested. Any suggestion that the level of constitutional protection decreases in the presence of speaker self-interest would have a dramatic and disruptive impact on the modern system of free expression, where fully protected expression is often employed to promote narrow individual or group interests. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449 (1958). Moreover, the presence of speaker self-interest in no way inherently implies that the speech is untruthful or harmful.

Second, where a product is the focus of public debate, characterizing corporate expression about the product as commercial speech would give rise to the very same constitutional problem that attends characterization of all commercially motivated expression as commercial speech: an entirely impermissible viewpoint-based discrimination in the protection of expression.

Imagine a debate between a spokesperson for Alcoholics Anonymous and the head of a winery about the health benefits and detriments of alcoholic beverages, or between a representative of a Vietnam veterans' organization and an official of a chemical company that produced Agent Orange about the health effects of that defoliant. Is it conceivable that First Amendment doctrine should, in such instances, wrap the attacker's criticisms of the product in the full protections of the First Amendment, while forcing the product's defender to speak at the peril of potentially severe sanctions for statements subsequently found (not necessarily reliably) to be inaccurate or misleading? Such a double standard of constitutional protection would necessarily give a significant advantage to one side of a public debate, a constitutionally impermissible result.

Finally, characterizing all corporate speech about a product as commercial speech, even when the product is the focus of a public debate, would contravene this Court's established holding that corporations possess full First Amendment

rights to comment on public issues. In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784 (1978), the Court found "no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation * * *." Moreover, the *Bellotti* Court found impermissible a "legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues * * *." *Ibid.*

Similarly, in shaping the commercial/non-commercial dichotomy, this Court noted in *Bolger* that "[a] company has the full panoply of protections available to its direct comments on public issues * * *." 463 U.S. at 68 (citing *Cent. Hudson*, 447 U.S. at 563 n.5). Where one of the corporation's products is itself the subject of, or closely intertwined with, one of those "public issues," it would effectively gut these explicit holdings and statements to exclude any manufacturer commentary about the product from the same level of First Amendment protection as other corporate speech about public issues receives.

Ironically, the result of excluding product-related speech from full First Amendment protection would be to inhibit communications regarding the very issue as to which a corporation possesses the greatest resources and information to make valuable contributions to the debate. Surely, this Court did not intend in *Bolger* to create so questionable an exception to its otherwise all-encompassing conclusion that corporations have "the full panoply" of First Amendment rights to contribute to public debates.

When viewed from the regulatory perspective, a dichotomy between product-related and non-product-related corporate expression is equally indefensible. Corporate expression about subjects other than the characteristics of the corporation's products is ultimately just as likely to be motivated by

the desire to preserve or expand sales as is the corporation's speech directly about its products – as, indeed, the California Supreme Court found to be true in this case. Nor does there appear to be any difference in the level of legitimate governmental interest in regulating the two forms of expression. As this case so clearly demonstrates, speakers often proceed on the assumption that consumers may be induced to purchase or not purchase products on the basis of factors other than the product's quality or safety.

B. Recognition Of A Corporation's Fully Protected Right To Contribute To Public Debate About Its Products Will Not Hamper Appropriate Regulation Of Truly Commercial Corporate Speech Regarding The Products.

Giving full First Amendment protection to a manufacturer's product-related speech when that speech constitutes participation in the debate on a subject of public interest and importance will not unduly impair reasonable and appropriate government regulation of false or misleading commercial advertising or other forms of consumer fraud. For the most part, a corporation's promotion of its products will have little or no relevance to debates on important public issues, and in such situations its expression is properly classified as commercial speech. While not stripped of all First Amendment protection, such speech is subject to appropriate regulation to protect against false or misleading statements.

Where, however, a product's characteristics are at the center of a public debate, and the producer's commentary about its product constitutes meaningful participation in that debate, any limitation of government regulatory powers would simply be the inescapable outgrowth of the need to preserve a debate on public matters that is "uninhibited, robust, and wide-open * * *." *New York Times*, 376 U.S. at 270. In *New York Times*, this Court held that expression that concededly caused substantial harm to private individuals

nonetheless must be protected, in order to ensure such uninhibited public interchange. *Ibid.* This was simply a specific example of a general proposition: whenever speech must be fully protected in order to ensure free and open debate on a matter of public concern, some restriction on governmental authority must be tolerated regardless of the content of that speech.

There will, of course, be borderline situations in which it is debatable whether corporate, product-related speech is properly classified as commercial. The central inquiry should be whether product marketing is the dominant character of the speech, and whether any references to public controversy are merely incidental to the communication. In such circumstances, the promotional efforts will generally be properly classified as commercial speech.

The Court can rely upon a variety of factors in separating manufacturer or producer speech about a product that is to receive full First Amendment protection from that expression that is to be properly classified as commercial speech. Relevant considerations would include (1) whether the communication is made in response to an attack on the product; (2) whether the linkage between the product and any public commentary is either gratuitous or remote; (3) whether the communication touts a specific brand (rather than simply mentioning it for the narrow purpose of speaker identification), even though the brand itself is not inherently part of the public debate; and (4) whether the communication includes a direct promotion of sale.[2]

When, however, reference to a product is "inextricably intertwined" with genuine commentary on a public issue, both this Court's precedents and the interests of free expres-

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[2] The fact that the corporate communication takes the form of an advertisement, however, should have only limited relevance to this inquiry.

sion dictate that such references receive the full protection of the First Amendment. See *Riley* v. *Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) ("[W]here * * * the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. *Therefore, we apply our test for fully protected expression.*") (footnote omitted) (emphasis added).

This may mean that society must accept a somewhat higher risk of exposure to inaccurate speech. But that is the price that the First Amendment exacts in order to ensure robust, uninhibited expression of views. The wisdom of this trade-off is a fundamental premise of our constitutional jurisprudence, and no less sound in the context of debates over product utility and safety than in any other public debate.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

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FEBRUARY 2003

Supreme Court, U.S.
FILED
FEB 28 2003
CLERK

29

No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,
Petitioners,
v.
MARC KASKY,
Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF *AMICI CURIAE* OF FORTY LEADING NEWSPAPERS, MAGAZINES, BROADCASTERS, WIRE-SERVICES, AND MEDIA-RELATED PROFESSIONAL AND TRADE ASSOCIATIONS (LISTED ON THE INSIDE COVER) IN SUPPORT OF PETITIONERS

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February 28, 2003

54 pp

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Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 14, 28

Branzburg v. Hayes, 408 U.S. 665 20

Central Hudson Gas & Electrical Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 28

Chern v. Bank of America, 544 P.2d 1310 (Cal. 1976) 5

City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993) 28, 29

Connick v. Myers, 461 U.S. 138 (1983) 5

Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) 14

Cortez v. Purolator Air Filtration Products, 999 P.2d 706 (Cal. 2000) 5

Edenfield v. Fane, 507 U.S. 761 (1993) 2, 19

Estes v. Texas, 381 U.S. 532 (1965) 20

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 7, 14, 21, 22

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 19

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)..... 14, 20

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 7

Keyishian v. Board of Regents, 385 U.S. 589 (1967)..... 27

Leoni v. State Bar, 704 P.2d 183 (Cal. 1985)..... 5

NAACP v. Button, 371 U.S. 415 (1963)..... 27

New York Times Co. v. Sullivan, 376 U.S. 254 (1964)..... 7, 16, 18, 21, 26

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)..... 3, 18, 26, 29

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)..... 22

In re R.M.J., 455 U.S. 191 (1982)..... 18

Riley v. National Federation of the Blind, 487 U.S. 781 (1988)..... 21, 28

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)..... 18, 26

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) 18

Sherman v. United States, 356 U.S. 369 (1958)..... 27

Thomas v. Collins, 323 U.S. 516 (1945) 21

United States v. United Foods, 533 U.S. 405 (2001)..... 4, 27

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)... 17, 19, 27

Whitney v. California, 274 U.S. 357 (1927)..... 18

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 18

OTHER AUTHORITY

Faulk, Richard O., *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech*, 16 No. 21 Andrews Del. Corp. Litig. Rep. 11 (2002)..... 12

Federalist No. 10 (Madison) (J. Cooke ed. 1961) 15

First Amended Complaint, *Union of Needletrades Indus. & Textile Employees, et al. v. The Gap, Inc., et al.*, No. 300474 (Ca. Super. Sept. 23, 1999)..... 8

Gray, Fred D., *The* Sullivan *Case: A Direct Product of the Civil Rights Movement*, 42 Case W. Res. L. Rev. 1223, 1226 (1992)..... 16

Lewis, Anthony, New York Times v. Sullivan *Reconsidered*, 83 Colum. L. Rev. 603 (1983)..... 16

Loeb, Jonathan A. & Sklar, Jeffrey A., *Be Careful When Your Company Speaks*, AGS&K Business Report (2002) 12

Mill, John Stuart, On Liberty (Blackwell ed. 1947)..... 18

Sullivan, Kathleen M., *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123 (1996)..... 19

Richman, *Greenwashing on Trial*, MotherJones.com (Feb. 23, 2001) 13

Redish, Martin H., *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433 (1990) 9

Wood, Gordon S., The Radicalism of the American Revolution (1992) 15

INTEREST OF *AMICI CURIAE*

Amici, which are listed on the inside cover and described in Appendix A, are leading newspapers, magazines, broadcasters, wire-services, and media-related professional and trade associations in the United States and abroad.[1] They share an interest in enforcing the First Amendment's prohibition against governmental interference in public debates. Indeed, many *Amici* are actively reporting on the globalization controversy that is at the center of this case, and most of Nike's communications to the press at issue here were sent to them. Because the California Supreme Court's extension of the "commercial speech" doctrine impermissibly intrudes on traditional methods of media coverage and public debate, *Amici* respectfully submit this brief in support of reversal.

SUMMARY OF ARGUMENT

I. The California Supreme Court's decision – which for the first time treats press releases, letters to the editor, and other types of submissions to the press as "commercial speech" that is subject to consumer protection law – seriously jeopardizes the media's ability to report on important issues regarding corporate America. Even a cursory review of prominent press coverage from the past few years reveals a vast array of corporate speech – on issues ranging from race discrimination to environmental sustainability to personal health and safety – that would now be subject to California's new strict liability dragnet. If the decision below is not reversed, business representatives will be deterred from

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

speaking to the press about these and other public issues. This chilling effect will deprive the public of access to important news stories and the clash of competing viewpoints that undergirds the First Amendment.

Equally pernicious, the California laws at issue here threaten to distort the business-related news that the press continues to cover. Although the California Supreme Court stated that certain inherent attributes of companies justify requiring their speakers "to make greater efforts to verify the truth of [their] statements" to the media and to prevent such statements from being potentially misleading, Pet. App. 22a, the First Amendment does not permit a state to disfavor one side of public debates in this manner. To the contrary, the Framers believed, and this Court has held, that the right to weigh the credibility of various public advocates must be left to the citizenry. Indeed, when, as here, certain organizations become the focus of public scrutiny because of their alleged lack of integrity or morality, courts should be especially intolerant of rules that would discourage such entities from speaking to the press to defend themselves.

II. Extending the definition of commercial speech beyond advertisements that do no more than propose commercial transactions to include corporate statements about publicly debated business operations is not only misguided, but it also is unnecessary. Commercial speech is subjected to reduced First Amendment protection to prevent "uninformed acquiescence," *Edenfield v. Fane,* 507 U.S. 761, 774-75 (1993) – that is, the harm that consumers may suffer if they respond to false product advertisements before there is an opportunity for counterspeech and reflection. But when a business practice becomes a matter of public concern, the media scrutinize corporate speech and typically place potentially misleading statements into context, thereby providing timely and corrective information.

That, in fact, is exactly what happened in this case. Respondent himself acknowledges that "[t]he media have continued to expose Nike's actual practices," First Amended Complaint (Petitioners' Lodging) ¶ 19, and an extended review of contemporaneous press coverage of Nike confirms that every one of Nike's allegedly misleading statements either was never reported or was challenged by counter-speech in the same media outlets in which they were printed. Under these circumstances – when the press provides consumers with competing information and time to reflect on it – the First Amendment prohibits states from making speakers on either side of a debate strictly liable for potentially deceptive or factually inaccurate statements.

Accordingly, this Court should make it clear that only speech, such as traditional product advertising, that does no more than propose a commercial transaction may be treated as commercial speech. Traditional product advertising is a "*business transaction* in which speech is an essential but subordinate component," *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 457 (1978) (emphasis added), but a company's speech regarding its corporate culture, such as Nike's speech here, is a *public statement* in which business is an essential but subordinate component. The ordinary checks on such public statements are able to mitigate the effects of any deceptive assertions they contain. Even when companies attempt to raise or defend their corporate culture or social image in advertising-type arenas, as Nike did here in its "editorial advertisements," the commercial element of such communications does not pertain to the actual performance or quality of products or services, or to the terms and conditions upon which they are available. Rather, these communications are aimed at swaying public opinion on a topic of public concern. As such, these social-image statements also should be afforded the full protection of the First Amendment.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S DECISION, IF AFFIRMED, WOULD INHIBIT THE MEDIA'S ABILITY TO REPORT ON ISSUES OF PUBLIC CONCERN REGARDING CORPORATE AMERICA.

A. The California Supreme Court's Definition of Commercial Speech Vastly Enlarges the Realm of Corporate Statements Subject to Regulation.

The California Supreme Court has taken a doctrine that this Court created to *expand* the First Amendment's protection of business speech and used it vastly to restrict companies' ability to participate in public debates. According to the decision below, speech is now "commercial" so long as it (i) is made by someone engaged in commerce "or someone acting on behalf of a person so engaged," Pet. App. 18a, such as an individual spokesperson or a trade association; (ii) is likely to reach potential buyers or customers; and (iii) involves descriptions of "business operations," employment or manufacturing policies, or other attempts to "enhance[] the image of [a company's] product or of its manufacturer or seller." Pet. App. 19a-20a. Petitioners have amply explained why this test is inconsistent with this Court's precedent, *see* Pet. for Cert. 10-15, but *Amici* wish to highlight three aspects of this new doctrine.

First, although this Court has "usually defined" commercial speech as that which "does no more than propose a commercial transaction" to consumers, *United States v. United Foods,* 533 U.S. 405, 409 (2001), the California Supreme Court explicitly held that commercial speech includes statements directed solely to reporters or newspaper editors in their capacities as newsgatherers. Pet. App. 4a, 18a. The California Supreme Court thus ruled that a business may be sued for consumer protection violations based on

answers given to reporters' questions, press releases, op-ed pieces or "editorial advertisements," regardless of whether the business's speech is printed or appears as part of a news story that includes opposing viewpoints.

Second, the California Supreme Court held that corporate communications to the media need not be false or even purposely or negligently misleading in order to be actionable. Pet. App. 7a. The Court ruled that such speech is unlawful – regardless of the speaker's intent or the public's actual knowledge – if it is "actually misleading *or* [it] has a capacity, likelihood *or* tendency to deceive *or* confuse the public." Pet. App. 7a (quoting *Leoni v. State Bar,* 704 P.2d 183, 194 (Cal. 1985)) (emphasis added); *see also Cortez v. Purolator Air Filtration Prods.,* 999 P.2d 706, 717 (Cal. 2000) (strict liability for deceptive practice under unfair trade practices law); *Chern v. Bank of Am.,* 544 P.2d 1310, 1316 (Cal. 1976) (same under false advertising law). Applied outside of traditional advertising arenas, this standard seemingly holds businesses strictly liable for ordinary "spin." If an executive or trade association granting an interview portrays a controversial business practice in the most favorable light – perhaps by omitting certain background details – then the statements may well have a "capacity . . . to deceive or confuse the public," thereby making them unlawful. What is more, it makes no difference whether the resulting media story clarifies these corporate statements or combines them with other speakers' allegations to create a balanced news story. As evidenced by Respondent's allegations in this case, it is the corporation's raw speech that provides the basis for punishment under California law, regardless whether the media repeat it or place it into context.

Third, although this Court has held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values," *Connick v. Myers,* 461 U.S. 138, 145 (1983) (quotation omitted), the California Supreme

Court ruled that "it does not matter that Nike was responding to charges publicly raised by others and was thereby participating in a public debate" on an issue of intense national and international interest. Pet. App. 25a. In the California Supreme Court's view, when public debate turns to a company's services or "business operations," the company, but not its critics, may be held strictly liable if its public statements are determined to be potentially misleading or false. Pet. App. 25a-27a. Indeed, under that Court's through-the-looking-glass view of commercial speech, the *more* intense the media debate is regarding a company's business practice, the *more* likely it is that a company's statements will be subject to regulation and potential litigation. This is because issues regarding a company's business operations that are hotly debated naturally are more likely to affect purchasing decisions and the company's bottom line, and thus the company's joinder in the debate is more likely to be motivated in part by a desire to "maintain[] . . . profits and sales." Pet. App. 25a.

B. Application of California's Expanded Consumer Regulations Would Impair the Media's Ability to Cover Numerous Issues of Intense Public Concern.

Accurate and useful reporting depends on considering all sides of an issue. When a public debate concerns a company's business operations, attaining such a complete picture requires newsgatherers to get information not only from interest groups and the company's detractors, but also from the company itself. The First Amendment's protection of the press, in fact, "rests on the assumption" that gathering and disseminating "information from diverse and antagonistic sources" will best serve the public welfare. *Associated Press v. United States,* 326 U.S. 1, 20 (1945). Reporters regularly strive to obtain corporate statements on issues involving their businesses to ensure that their stories are complete. News stories that impart the view of each

opposing party are more likely to be deemed trustworthy or neutral by the reader or viewer.

The California law at issue here will seriously hamper the media's ability to obtain these critical business-oriented statements. As a general rule, any law that "impose[s] strict liability on [speakers] for false factual assertions" regarding public issues has "an undoubted 'chilling' effect" on valuable speech. *Hustler Magazine v. Falwell,* 485 U.S. 46, 52 (1988); *accord New York Times Co. v. Sullivan,* 376 U.S. 254, 277-78 (1964). This Court has held that the threat of liability has the same effect in the corporate context. If states could punish corporate speech on any public issue that "materially affected" the company's profitability:

> [m]uch valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk [those penalties]. . . . In addition, the burden and expense of litigating the issue – especially when what must be established is a complex and amorphous economic relationship – would unduly impinge on the exercise of the constitutional right. [T]he free dissemination of ideas [might] be the loser.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785 n.21 (1978) (quotation omitted). California's expansion of the commercial speech doctrine presents exactly these risks.

Because issues concerning companies' business operations are increasingly fundamental to the world's social and political landscape, the withdrawal of corporate voices on those issues from the media would deprive the public of vital information. Nike, for example, is not the only multinational corporation whose labor policies in third world

countries have been the focus of public scrutiny. An executive from another company, Cutter & Buck, responded to allegations that its garments were made in overseas "sweatshops" by telling the media that "I have no objection to outside monitoring because I have every confidence our factories would pass." Les Blumenthal, *Combating Sweatshops: Not All Clothing Retailers Are Embracing Clinton's Plan To Have Voluntary Inspections of Overseas Clothing Factories,* The News Tribune (Tacoma, Wa.), April 15, 1997, at B4. Labor organizations sued the company, alleging that its executive's statement amounted to false advertising in the same way that Nike's speech did. First Amended Complaint ¶¶ 95 & 125, *Union of Needletrades Indus. & Textile Employees, et al. v. The Gap, Inc., et al.,* No. 300474 (Ca. Super. Sept. 23, 1999). Such lawsuits are sure to dampen public discourse on this issue.

In addition, media coverage of corporations' business operations goes far beyond labor policies in developing countries. A selection of recent news coverage reveals the extraordinary reach of the chilling effect that the California Supreme Court's decision would impose:

• Civil rights groups recently have alleged that several companies' practices of stocking different merchandise or requiring different forms of payment in predominantly minority communities amounts to invidious racial discrimination. When asked to explain why its "no check" policy appeared to be limited to stores in predominantly black neighborhoods, an executive for the parent company of KB Toys stated that despite using "check-acceptance services designed to screen for problem checks" in the pertinent stores, fraudulent check rates still "can be as high as 20 percent." Stephanie Stroughton, *Suit Alleges Bias by KB Toys,* Wash. Post, Dec. 16, 1999, at A1. Although facts like these are critical to the public debate over whether retail "red-lining" practices are wrong and should be

prohibited, the *Kasky* doctrine would hold that businesses contribute information to this debate at their peril.

• Prior to *Kasky*, it was accepted wisdom that "[i]f a real scientific debate about the health impact of a product exists, the manufacturer would retain a fully protected [First Amendment] right to comment on that debate" outside of its direct advertisements and product labels, "even though the likely and intended impact of the comment on the listener would be the creation of a desire to purchase that product." Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech,* 43 Vand. L. Rev. 1433, 1453 (1990). A passage from a recent magazine cover story evinces this principle:

> David Ludwig, director of the Obesity Program at Children's Hospital in Boston, says his research shows that "for every additional serving of soft drinks a day, a child's risk of becoming obese increases by 60 percent." Ludwig's soft drink study also suggests that calories from sugar-sweetened drinks do not seem to be as filling as calories from other foods. Soon after Ludwig's results hit the media, studies paid for by the National Soft Drink Association used government data to show that soft drinks do not cause obesity. "If you go through all the scientific evidence, you see there is no link between consumption and obesity," says Sean McBride of the NSDA. . . . This debate is only the beginning.

Amanda Spake & Mary Brophy Marcus, *The Fattening of America,* U.S. News & World Report, Aug. 19, 2002, at 46. Indeed, this debate already is spreading to the health effects of school lunches and of McDonald's-type fast food.

Because food and beverage manufacturers' speech on such health-related issues undoubtedly is in part driven by product image and economics, *Kasky* would restrict speech on one side of these disputes, thereby inhibiting the media's ability to compare both viewpoints in order to ferret out the truth.

• A similar controversy recently occurred in Oregon over a proposal to adopt a state law requiring labeling of genetically engineered foods. Interest groups supporting the initiative asserted that food companies are creating "Frankenfood" – that is, "something we can't control" – and that they are "like little kids playing with a chemistry set in a back bedroom." Brad Cain, *Labels for Genetically Altered Food Put to Vote,* Seattle Times, Aug. 12, 2002, at B2. A spokesman for food manufacturers responded that genetic alterations are "in all kinds of food, and there's never been a single case of illness or any other problem." *Id.* With consumer protection regime like California's in place, the spokesman may well have declined to offer such a response, and voters may have been deprived of this news coverage concerning an issue central to the proposed initiative.

• There also are heated public debates regarding sustainable environmental practices and whether people should support companies that treat natural resources in certain ways. Environmental groups, for instance, have called on consumers and chefs to boycott swordfish and sea bass on the ground that the seafood industry is over-fishing those species. But the industry says that boycotts are unnecessary because fishing companies' new, self-imposed quotas are sufficient to protect the ecosystem. Carolyn Jung, *Activists, Industry Debate Reason for Swordfish Comeback,* San Jose Mercury News, Oct. 16, 2002, at 1; Beth Daley, *Sea Bass Overfishing Tests Industry's Policing Ability,* Boston Globe, Aug. 21, 2002, at A1. Such give-and-take is critical to developing effective policies not only for oceans and rivers, but also for the world's forests and mines. *See, e.g.,*

Glen Martin, *Redwood Logging Firm Recognized for Sustainable Practices,* S.F. Chron., Nov. 17, 2000, at A11; Terry McCarthy, *Plumbing the Pasture,* Time, July 16, 2001, at 22. Yet "as public concern about the environment grows, there is an increasing acceptance in executive suites that industrial reform" concerning a wide range of practices "can be good for the environment *and* good for profits." Eric Roston, *New War on Waste,* Time, Aug. 26, 2002, at A28 (emphasis added). Hence, the economic component of these sustainability debates apparently makes them subject to California's strict liability regime.

• Finally, some important public debates occur between two businesses. Following a recent spate of accidents involving Ford Explorers, Bridgestone/Firestone alleged that "the real problem" derived from unsafe vehicles, while Ford "vehemently insist[ed] it [was] a tire problem." Terril Yue Jones, *Bridgestone Rejects Wider Recall Request,* L.A. Times, July 20, 2001, at B1. Although these companies' public descriptions of their safety tests were driven partly by a desire to protect their profitability, *id.*, they also imparted vital information to consumers in the automotive market. Under *Kasky,* however, such differing corporate statements provide fodder not only for tort lawsuits, but for "false advertising" claims as well. This type of threat may well deter the release of contemporaneous safety-related information the next time around, perhaps regarding air travel. *See* Sally B. Donnelly, *Just Plane Dangerous,* Time, Aug. 13, 2001 (dispute between airline and its repair company). Even if a company honestly believes its contested practice is safe or lawful, the prospect of immediate nuisance lawsuits – not to mention additional *Kasky*-based claims if a jury later disagrees with the company's public assessment of its practice, *see* Pet. App. 22a – could be too high a price to pay for defending it in the media.

The threat of liability under the decision below is so serious that businesses already have begun to constrict their lines of communication with the press. Business periodicals are advising companies that "[u]nless and until the U.S. Supreme Court reviews *Kasky* . . . [t]he safest course may be to make no reference at all to one's products, services, or business operations – but that may amount to saying nothing at all when one's industry is under general attack." Jonathan A. Loeb & Jeffrey A. Sklar, *Be Careful When Your Company Speaks,* AGS&K Business Report (visited Oct. 23, 2002) <http://www.alschuler.com/print/ brsum02.html>; *see also* Richard O. Faulk, *A Chill Wind Blows: California's Supreme Court Muzzles Corporate Speech,* 16 No. 21 Andrews Del. Corp. Litig. Rep. 11 (2002) (urging corporate executives to devise "preventative systems" for vetting corporate communications and campaigns, "even those that are 'defensive' in nature"); Roger Parloff, *Can We Talk? A Shocking First Amendment Ruling Against Nike Radically Reduces the Rights of Corporations to Speak Their Minds,* Fortune, Sept. 2, 2002, at 102 (describing need for businesses to alter behavior as a result of *Kasky*).

There can be no doubt, in sum, that an affirmance here would transform the way that the media report on a vast array of public issues. Businesses, big and (even more so) small, would be deterred from speaking on issues concerning their operations, or they would offer only bland, indisputable claims, for fear of being held liable for good faith errors or unintended but potentially "misleading" implications. Spontaneous interviews also would be far less informative, for any alert business would rely on carefully crafted statements designed to keep it out of court. When news stories themselves center on media entities or media practices – such as the recent coverage of AOL Time Warner, the ultimate parent of *Amici* CNN and Time Inc., or the current debate over the cross-ownership and increasing consolidation of news outlets – the California laws here present still more

difficulties, for they render media companies and their trade or professional associations doubly subject to vexatious litigation. Media organizations, as business entities, are subject to liability for their public descriptions of their business operations. And media organizations, as publishers, are potentially subject to legal claims arising out of their coverage of their corporate parents that their competitors are not. The result of all this will be far less public information regarding important corporate issues, to the detriment both of businesses' supporters and their critics.

C. Nothing Inherent in Individuals' Pursuit of Corporate Interests Justifies Imposing Special Burdens on Their Ability to Participate in Public Debates.

The chilling effect that *Kasky* would impose on businesses' participation in public debates is, to a substantial extent, not even contested. It is an explicit goal of some interest groups supporting the decision. One "corporate watchdog group" has explained that "[i]f this case is successful, it could undermine the greenwashing strategies of a lot of corporations that attempt to promote a positive environmental or social image to undermine their critics and minimize the damage done to their brand." Josh Richman, *Greenwashing on Trial,* MotherJones.com (Feb. 23, 2001) <http://www.motherjones.com/web_exclusives/features/news/greenwash.html> (quoting Joshua Karliner, Executive Director of Corpwatch). After the California Supreme Court's decision was announced, an editorial that was widely circulated on anti-globalization websites declared that "[t]he ruling was a victory for the public interest and groups taking on powerful corporations and their image-makers." Jeff Milchen, *Bill of Rights Freedoms Belong to People, Not Corporations,* Pac. News Serv. (May 14, 2002) <http://www.news.pacificnews.org/news/view_article.html?article_id=300>. The *Kasky* decision, in other words, benefits anti-

globalization groups' public relations campaigns, not consumers.

The California Supreme Court essentially acknowledged as much. The Court conceded "that application of [its ruling] may make Nike more cautious, and cause it to make greater efforts to verify the truth of its statements." Pet. App. 22a. Making speakers more "cautious," as this Court has explained, is simply a euphemism for chilling speech. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). But the California Supreme Court, Respondent, and Respondent's supporters apparently believe that businesses' public statements – but not their critics' – may be subjected to strict liability rules because businesses are motivated in part by pecuniary interests and they supposedly have a superior ability to substantiate their press releases. Pet. App. 27a; Opp. to Pet. for Cert. 25.

The First Amendment does not permit a state to disfavor corporate speech in this manner. Companies that comment on public issues outside of direct product advertisements enjoy the First Amendment's "full panoply of protections," regardless of their motivations for doing so. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *see also Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (power company has unrestricted First Amendment right to comment on debate over nuclear power). Indeed, in holding in *Bellotti* that corporations have an unfettered right to speak out on proposed legislation that would affect their finances, this Court made it plain that even when such speech is merely reprinted in an editorial advertisement, the public "may consider . . . the credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by [a business], it is a danger contemplated by the Framers of the First Amendment." *Id.* at 791-92. They believed that a commercial motivation – such as a "creditor[]" or

"manufacturing" interest – was perfectly legitimate, and that liberty and sound social policy would best be achieved by allowing a free press and an inquisitive public to weigh the unrestrained expression of *all* interested parties. Federalist No. 10 (Madison), at 58-60 (J. Cooke ed. 1961); *see also* Gordon S. Wood, The Radicalism of the American Revolution 336-37 (1992) (Framers encouraged open pursuit of all interests, including commercial interests).

The First Amendment's mandate that the media and the public, not the courts, evaluate the credibility of speakers in public debates should not be watered down during this period of heightened skepticism of corporate practices. When businesses speak out on public issues, the media are just as capable of evaluating and investigating their speech as anyone else's. And when the media run stories including factual assertions from businesses, the public's increased wariness of such assertions hardly provides reason to punish businesses for any inadvertent inaccuracies or unintended implications. The public is quite accustomed to dealing with potentially misleading speech from interest groups and politicians, whose motivations for speaking are often just as selfish as businesses', and whose reputations for unvarnished veracity are often just as suspect.

Indeed, if anything, it is now more important than ever that courts refrain from discouraging business representatives from speaking out on issues regarding their corporate cultures. News coverage and investigative journalism are frequently driven by clashes of competing points of view. Thus, when the media are unable to obtain corporate responses to allegations of misconduct, they may shelve such stories for fear of publishing something that is too one-sided, or simply for lack of an apparent controversy. The more often, in other words, the media get a "no comment" from business, the less often they may run stories on business-related issues. In this respect, an affirmance here

would have exactly the opposite effect than the California Supreme Court and its supporters intend. The inner workings of corporations would become less transparent, not more so.

This Court has confronted a situation presenting a similar danger before. The litigation that culminated in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964) – which, like part of this case, was based on an "editorial advertisement" purchased in a newspaper – was "part of a concerted strategy" designed to chill press coverage of one side of a pressing public issue: the desegregationists' side of the civil rights movement. Fred D. Gray, *The* Sullivan *Case: A Direct Product of the Civil Rights Movement,* 42 Case W. Res. L. Rev. 1223, 1226 (1992). And like this case, the decision under review in *Sullivan* came from a region on the leading edge of one side of the debate. A state supreme court attempted to use one state's law effectively to regulate media coverage throughout the nation. *See* Anthony Lewis, New York Times v. Sullivan *Reconsidered,* 83 Colum. L. Rev. 603, 605 (1983).

One generation ago, this Court held in *Sullivan* that imposing strict liability in "one of the major public issues of our time" for speech containing falsehoods would undercut the First Amendment's basic purpose of assuring "uninhibited, robust, and wide-open" debate on such issues. 376 U.S. at 270-71. It is imperative that this Court refuse to allow the law of one state single-handedly to dry up information on one side of another major public debate, this time over corporate globalization.

II. EXPANSION OF THE COMMERCIAL SPEECH DOCTRINE BEYOND STATEMENTS THAT DO "NO MORE THAN PROPOSE A COMMERCIAL TRANSACTION" IS UNNECESSARY BECAUSE MEDIA COVERAGE ADEQUATELY INFORMS CONSUMERS REGARDING COMPANIES' CONTROVERSIAL BUSINESS PRACTICES.

The California Supreme Court's expansion of the commercial speech doctrine not only threatens to hamper media coverage of public issues regarding corporate America, but it does so for no good reason. One of this Court's principal justifications for curtailing the level of protection afforded to commercial speech is that such speech typically affords consumers little time or ability to scrutinize its truthfulness. While that logic may make sense in the realm of product labels and advertisements, it lacks any force whatsoever when the corporate speech at issue is directed toward the media in the context of an extended public debate. Indeed, the very press coverage of Nike that forms the backdrop of this case demonstrates that the media serve as an effective watchdog over corporate press releases and more than adequately counterbalance companies' assertions regarding controversial business operations. Accordingly, this Court should make it clear here that the universe of "commercial speech" cannot be expanded beyond companies' statements that do "no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976).

A. Corporate Communication with the Media, Unlike Traditional Product Advertising, Permits Public Scrutiny and Counterspeech.

This Court has explained that "[i]n assessing the potential for overreaching and undue influence" of speech, "the mode of communication makes all the difference."

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 475 (1988). Hence, one of the main reasons that this Court affords commercial speech less First Amendment protection than other speech is that the public often "lacks sophistication" or access to the information necessary to evaluate a manufacturer's claim. *In re R.M.J.,* 455 U.S. 191, 200 (1982) (quoting *Bates v. State Bar of Ariz.,* 433 U.S. 350, 383 (1977)). When a company asserts that its product contains a certain ingredient, for example, that claim may not provide any realistic opportunity for factual or ideological debate. *See Rubin v. Coors Brewing Co.,* 514 U.S. 476, 496 (1995) (Stevens, J., concurring). Consumers, therefore, "may respond to [false advertisements] before there is time for more speech and considered reflection to minimize the risks of being misled." *Id.* Even within the realm of commercial speech, this Court has held that statements that are "more conducive to reflection and the exercise of choice on the part of the consumer" receive incrementally more First Amendment protection. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 642 (1985) (print advertisements more protected than personal solicitations); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 457-58 (1978) (same).

A corollary of this Court's inability-to-reflect rationale is that false or misleading speech in the "commercial" context may be regulated because it "lacks the value that sometimes inheres in false or misleading political speech." *Rubin,* 514 U.S. at 496 (Stevens, J., concurring). The usual rule is that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.' " *Sullivan,* 376 U.S. 279 n.19 (quoting John Stuart Mill, On Liberty 15 (Blackwell ed. 1947)); *see also Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("the remedy to be applied" to false political speech "is more speech, not enforced silence"). But in the sphere of product advertising,

the predominant goal is sales, not knowledge, and the time frame is short, not long. Thus, this Court has held that the regulation of misleading commercial speech prevents "uninformed acquiescence," *Edenfield v. Fane,* 507 U.S. 761, 774-75 (1993), because "the consumer is not expected to have the competence or access to information needed to question the advertiser's claim." Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 156 (1996).

The California Supreme Court's extension of the commercial speech doctrine in this case rips the doctrine completely away from this underpinning. The decision holds that a business's speech is "commercial" even if it pertains merely to a company's social "image," Pet. App. 19a-20a, rather than to any actual product, and even if it pertains to an extended media debate, rather than an ephemeral purchasing decision.

This extension is wholly unjustified. Whatever force the inability-to-reflect rationale has when applied to consumers' evaluation of the tangible attributes of a product disappears in the context of debates over good corporate citizenship. By holding that consumers require "protection" from potentially misleading information pertaining to a company's social image, the California Supreme Court has applied a version of the "paternalistic approach" to commercial speech regulation that this Court long has rejected. *Virginia State Bd. of Pharmacy*, 425 U.S. at 770; *accord 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 496-98 (1996) (plurality opinion); *id.* at 520-23 (Thomas, J. concurring in the judgment). It is paternalistic to assume that consumers lack the ability or sophistication to decide for themselves whether a company's image reflects reality, or whether that image should influence their purchasing decision at all.

Furthermore, the California Supreme Court's decision obfuscates the press's role in the marketplace of ideas. This Court has long recognized that the press is "a mighty catalyst in . . . informing the citizenry of public events and occurrences." *Estes v. Texas,* 381 U.S. 532, 539 (1965). This is because the media do more than simply provide an empty vessel for third parties to disseminate their speech. *See Branzburg v. Hayes,* 408 U.S. 665, 729 (Stewart, J., dissenting). Rather, it is a core function of the press to consider the source of statements that it receives, as well as to investigate those statements' veracity and to set them beside the counterspeech of other interested parties. Thus, when a news organization receives a company's press release regarding its business operations, the organization can bring independent judgment to bear on the accuracy of the release. If a company's assertions are not credible, the media can, and sometimes do, decline to run any story on the subject. When media entities publish controversial claims by businesses (either because the claims are open to debate or because a publisher feels that the subject of a report is entitled to present its side of the story), they generally contrast those claims with independent analysis or opponents' counterclaims. *Cf. Gertz,* 418 U.S. at 344 (press provides means of "counteract[ing] false statements" regarding public figures). Unlike the typical advertising scenario, in short, potentially misleading corporate press releases in the course of a public debate are tempered by their clash with competing speech.

Even when the media reprint a business's speech in an op-ed or an editorial advertisement, that speech is very likely to be responsive to, or challenged by, other articles in the same publication. In contrast to advertisements that directly propose commercial transactions, companies usually do not take the trouble to purchase space to discuss their *business operations* unless those operations have become the subject of considerable public scrutiny. *Compare, e.g.,*

James Gleick, *Tangled Up in Spam,* N.Y. Times Magazine, Feb. 9, 2003, at 42 *with* Microsoft Corp., *Spiking the Spammers*, N.Y. Times, Feb. 13, 2003, at A33 (editorial advertisement); *see also Sullivan,* 376 U.S. at 266 (editorial advertisements are "an important outlet for the promulgation of information and ideas" by non-publishers). Certainly that was the case with Nike. Consequently, as with press releases, the media typically arm the public with the resources for full reflection on business practices discussed in op-eds and editorial advertisements.

Not only is the press effective in ventilating corporate speech and in unmasking misleading claims regarding issues of public concern, but it is the preferred means of doing so. "[S]elf-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *Bellotti,* 435 U.S. at 777 n.12 (quoting *Associated Press,* 326 U.S. at 20). Accordingly, "[t]he very purpose of the First Amendment is to foreclose [the government] from assuming guardianship of the public mind" through unnecessarily regulating the content of public debate. *Riley v. National Federation of the Blind,* 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins,* 323 U.S. 516, 545 (1945) (Jackson, J. concurring)). Whenever the press presents the public with adequate information to assess the accuracy of a speaker's claim, "*the people* in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of the conflicting arguments." *Bellotti,* 435 U.S. at 791 (emphasis added).

The California Supreme Court's decision here pretermits this entire process of ventilation and individual assessment. It holds that the moment a company sends a press release or letter to the media that offers a potentially misleading portrayal of the company's business operations, the company may be sued and held strictly liable. It does not matter whether the media ever print the company's

statements or, if they do, whether they place those statements in context or beside assertions refuting them. This holding impermissibly substitutes state regulation of the content of public debate for media scrutiny and counterspeech. What is more, the ruling handicaps the business side of all public debates regarding business issues, by "licens[ing] one side of a debate to fight freestyle, while requiring the other side to follow Marquis of Queensberry rules." *R.A.V. v. City of St. Paul,* 505 U.S. 377, 392 (1992). Especially in these circumstances, "the First Amendment is plainly offended." *Bellotti,* 435 U.S. at 785-86.

B. The Media Coverage of Nike at the Center of This Case Confirms That Subjecting Its Speech to Consumer Protection Laws Is Unnecessary and Inappropriate.

The record and the press coverage related to this case underscore the imprudence of the California Supreme Court's decision. Although the purported linchpin of Respondent's complaint is that Nike has deceived the public by making misleading statements to the press regarding its business operations, Respondent himself acknowledges that "[t]he media have continued to expose Nike's actual practices." First Amended Complaint (Petitioners' Lodging) ¶¶ 19; *see also id.* Exs. F-L (collecting some such articles). Indeed, a review of the contemporaneous press coverage of Nike during the controversy in the mid-1990's over its overseas manufacturing practices reveals that every single one of Nike's allegedly misleading statements either was never reported or was challenged by counterspeech in the same media outlet. This is what one would expect regarding an issue of intense public concern, and it leaves one at a loss to comprehend why state regulation is necessary or appropriate in this area.

Respondent complains about four statements that Nike made in press releases. The first one was a response to mounting protests in 1996 that Nike, as summarized in a column in *The New York Times*, "benefit[s] directly and indirectly from the systematic oppression of the Indonesian people" and that "Nike executives . . . are not bothered by the cries of the oppressed. It suits them. Each cry is a signal that their investment is paying off." Bob Herbert, *Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, at A29. Nike countered in its press release that it treated its overseas workers well and that the average line-workers' wage in Asian facilities was "double the government-mandated minimum." Compl. ¶ 46. Nike's release did not generate any immediate press reports. When the media eventually ran stories repeating Nike's double-the-minimum-wage claim, they generally stated in the same articles that the claim was potentially misleading. *Business Week*, for instance, reported that "Nike Chief Executive Philip H. Knight defends the Indonesian operations, saying that sneaker assemblers in Indonesia earn an average of double the minimum wage. But that's because they have no choice but to do overtime." Elisabeth Malkin, *Pangs of Conscience: Sweatshops Haunt U.S. Consumers,* Business Week, July 29, 1996, at 46. The *San Francisco Chronicle*, the leading newspaper in Respondent's hometown, further noted in an article printing Nike's claim that developing countries "deliberately set [minimum wages] below the subsistence level" and that a human rights group was asserting that Nike pressured such countries into denying overtime and keeping worker pay artificially low. Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. Chron., June 27, 1996, at A19.

Respondent also complains about Nike's statement in the same press release that it provided "free meals" to its employees. Compl. ¶ 52. But when the *San Francisco Chronicle* investigated this claim, it reported that despite such promises, a factory in Indonesia "started deducting 25

cents-a-day from workers' daily wages as a charge for the cost of lunch." Julia Angwin, *The Tired Souls Behind Nike Soles: Indonesian Worker Tells of Suffering,* S.F. Chron., July 26, 1996, at B3. When a representative business periodical repeated Nike's assertion, it also noted that other groups, "on the other hand, are concerned about persistent reports of exploitative conditions." Andy Zipser, *Nike: Shareholders Will Be Sweating It Out, Too,* Barron's, Sept. 16, 1996, at 10.

Coverage of Nike's two other allegedly misleading assertions in press releases followed a similar pattern of point and counterpoint. Nike's representation that its "expatriates ensure safe working conditions and prevent illegal working conditions, Compl. ¶ 28, was quickly challenged in a nationally televised segment on CBS's news magazine *48 Hours.* The story recounted "a fair number of incidents of physical abuse of workers" in violation of local regulations at Nike's Asian factories and suggested that Nike exercised very little control over supervisors of those factories. *48 Hours: Just Doing It* (CBS television broadcast, Oct. 17, 1996), *transcript available at* <http://www.saigon.com/~nike/48hrfmt.htm>. A *Time* magazine article added that Nike had a "credibility problem" on this issue because even if factory owners truly abide by "the Indonesian government's labor standards[, that] is saying very little" because those standards condone such dubious practices as child labor. Nancy Gibbs, *Cause Celeb: Two High-Profile Endorsers Are Props in a Worldwide Debate Over Sweatshops and the Use of Child Labor*, Time, June 17, 1996.

Nike's final contested press release – in which it asserted it guaranteed "a living wage for all workers," Compl. ¶ 62 – was issued about one year later, in response to renewed allegations against the company. In the fall of 1997, leading newspapers reported that a coalition of women's

groups was charging that Nike's Asian female employees "often suffer from inadequate wages, corporal punishment, forced overtime and/or sexual harassment." Steven Greenhouse, *Nike Supports Women In Its Ads, But Not Its Factories, Groups Say,* N.Y. Times, Oct. 26, 1997, at A30; *see also* Dottie Enrico, *Women's Groups Pressure Nike on Labor Practices,* USA Today, Oct. 27, 1997, at B2. (By this time, several Internet sites also were collecting and posting negative press coverage of Nike in order to combat, as one such website entitled "Boycott Nike" put it, Nike's "progressive image." *Boycott Nike* (visited Feb. 12, 2003) <http://www.saigon.com/~nike/nike.html>.) After Nike issued its responsive press release, a typical media story repeating Nike's "living wage" claim also included an assertion from an interest group that "Nike's workers in Vietnam could 'barely afford three meals a day let alone transportation, rent, clothing, health care, and much more.'" *Nike's Treatment of Women Overseas Assailed; Spokesman Defends Pay,* Dallas Morning News, Nov. 2, 1997, at A44. An ESPN television documentary that later aired on the issue also directly challenged Nike's claim. *See* Compl. ¶ 64 (describing *Outside the Lines: Made in Vietnam: The American Sneaker Controversy,* ESPN television broadcast, April 2 & 11, 1998)).

Nike's letters to the editor and editorial advertisement that Respondent complains of also met with vigorous concurrent counterspeech. Nike's letter to the editor of *The New York Times,* in which it claimed that it provided employees "free meals, housing and health care," Compl. ¶ 52, appeared amidst several scathing editorials in that newspaper – as well as in one of Respondent's local papers – concerning Nike's overseas business practices. *See* Bob Herbert, *Nike's Pyramid Scheme,* N.Y. Times, June 10, 1996, at A17; Bob Herbert, *Nike's Bad Neighborhood,* N.Y. Times, June 14, 1996, at A29; Bob Herbert, *From Sweatshops to Aerobics,* N.Y. Times, June 24, 1996, at A15; Bob Herbert,

Trampled Dreams, July 12, 1996, at A27; Stephanie Salter, *Decent Wages for Nike Workers? Just Do It,* S.F. Examiner, June 27, 1996, at A19. Nike's editorial advertisement asserting that it was "doing a good job" and "operating morally," Compl. ¶ 58, appeared during this same time period and on the same day (June 24, 1997) as one of Mr. Herbert's columns. It was followed later by another editorial in the *San Francisco Chronicle* claiming that "Nike's hypocrisy knows no bounds." Tim Keown, *Hypocrisy is Nike's Sole Purpose,* S.F. Chron., Dec. 14, 1997, at E1.

In light of all of this contemporaneous and easily accessible press coverage, it is difficult to understand how consumers could have been misled by any inaccuracies in Nike's speech. At the very least, any person who wished to factor Nike's labor practices into her purchasing decisions would have been alerted that serious allegations had been leveled against Nike and that Nike's credibility was being questioned. If consumers believed Nike's statements, it was not because they lacked the ability to reflect on the ongoing controversy or because they lacked access to "more speech" challenging Nike's assertions. *See Rubin,* 514 U.S. at 496 (Stevens, J., concurring); *Ohralik,* 436 U.S. at 457-58. Nor was it because any party's false statements did not "make a valuable contribution to the debate" by triggering additional investigation and corrective speech. *Sullivan,* 376 U.S. at 279 n.19. In the classic mode of public discourse on a controversial issue, the media ventilated competing claims and provided the people with information that allowed them to draw their own conclusions. The California Supreme Court's decision rendering such press coverage inadequate tramples basic First Amendment principles.

C. This Court Should Make Clear That Speech That Does More Than Propose a Commercial Transaction Cannot Be Treated as Commercial Speech.

The California Supreme Court's decision illustrates the damage that can occur when this Court's rules governing free expression are less than plain. This Court has long observed that statutory schemes that regulate speech are bound to chill valuable discourse if they contain opaque standards that keep people guessing as to whether certain statements fall within their ambit. *See, e.g., NAACP v. Button,* 371 U.S. 415, 432-33 (1963) ("precision must be the touchstone" in regulating First Amendment freedoms). The same is true of this Court's decisions in this realm. Whenever possible, this Court should "clearly inform" lower courts and the public whether and how certain categories of speech may be regulated. *Keyishian v. Board of Regents,* 385 U.S. 589, 604 (1967). And when initial explanations from this Court fail to provide adequate guidance, "the Court should not rest on [its] first attempt at an explanation for what sound instinct counsels. It should not forego re-examination to achieve clarity of thought, because confused and inadequate analysis is too apt gradually to lead to a course of decisions that diverges from the true ends to be pursued." *Sherman v. United States,* 356 U.S. 369, 379 (1958) (Frankfurter, J., concurring).

Such reexamination is in order here, for this Court's jurisprudence defining what expression constitutes commercial speech does not currently provide the unambiguous direction that the First Amendment demands. In the seminal *Virginia State Bd. of Pharmacy* decision, this Court defined commercial speech as that which "does no more than propose a commercial transaction." 425 U.S. at 762 (quotation omitted). But this Court has since muddied the waters by suggesting that alternative tests might sometimes be relevant. *See United Foods,* 533 U.S. at 409 (commercial speech is

"usually defined" by the "no more than" test); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (noting that this Court termed "a somewhat larger category" of speech as commercial in *Central Hudson* decision); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) ("expression related solely to the economic interests of the speaker and its audience" is commercial); *Bolger*, 463 U.S. at 66-67 (looking to a still different "combination" of factors). Various lower courts now employ inconsistent standards in determining which speech is commercial. *See* Br. *Amicus Curiae* of Chamber of Commerce of U.S. in Support of Pet. for Cert. at 5-8.

The media are especially affected by this uncertainty. Reporters need to operate in a legal landscape in which sources, including business leaders, are assured that innocent misstatements or unintentionally misleading remarks will not subject their companies to lawsuits. Even when business personnel are not caught off guard by a request for an interview, such persons need to be able to impart information to the media with a clear understanding of legal rules governing their statements.

Accordingly, this Court should hold here unequivocally that only speech that does no more than propose a commercial transaction – that is, speech that does no more than promote tangible qualities of a product or service in a traditional advertising format – may be treated as commercial speech and subjected to strict liability rules such as the California laws at issue here. Corporate statements that are directed to the press or the public outside of a traditional advertising format are best characterized as imparting a business point of view on an issue of public concern, even if those statements include references to the company's products or services. *See Riley*, 487 U.S. at 796 (1988) (commercial speech that is "inextricably intertwined with otherwise fully protected speech" must be treated the

same as other public discourse). The ordinary checks on public statements will adequately correct any deceptive assertions in such statements.

Even when companies attempt to raise or defend their corporate social image in advertising-type arenas, as Nike did here in its editorial advertisements, such companies are not exhorting the public to buy their products in a way that triggers the need to punish them for any misleading messages they may convey. Governments may punish commercial speech more readily than non-commercial speech only in order to "protect[] consumers," *Ohralik*, 436 U.S. at 460, or to "prevent[] commercial harms." *Discovery Network*, 507 U.S. at 426. If these objectives are to have any meaning (and any limit) in our modern society, they must pertain only to tangible aspects of products and services – whether shoes are actually leather or whether they actually are on sale for $75. Although some consumers may be influenced in their purchasing decisions by a company's social image or its labor or environmental practices, misleading statements regarding those practices do not pertain to the actual performance or quality of products, or to the terms and conditions upon which they are available.

Put another way, traditional advertising or solicitation is a "*business transaction* in which speech is an essential but subordinate component," *Ohralik*, 436 U.S. at 457 (emphasis added), but a company's speech regarding its corporate culture, such as Nike's speech here, is a *public statement* in which business is an essential but subordinate component. When a company's public statements are designed in part to participate in such public debates, this Court should refuse to allow a state to substitute a strict-liability consumer-protection regime for the First Amendment's preferred process of investigation, counterspeech and reflection.

CONCLUSION

For the foregoing reasons, the decision of the California Supreme Court should be reversed.

Respectfully submitted,

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Appendix B]

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APPENDIX A

Descriptions of *Amici*

ABC, Inc., alone and through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20* and *Nightline*.

American Booksellers Foundation for Free Expression (ABFFE) is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books. It disseminates information about dangers to free expression on its website, www.abffe.com. ABFFE also publishes a monthly newsletter, which it distributes to subscribers, and makes other publications available to the public through its on-line store. ABFFE has hundreds of bookseller members who are located from coast to coast.

American Business Media, founded in 1906, is the business-to-business industry association for global information providers that represent magazines, websites, trade shows, conferences, newsletters, and other media. These member companies reach an audience of more than 88.9 million professionals and generate more than $239 billion in industry revenues.

The American Society of Newspaper Editors (ASNE) is a professional organization of more than 800 persons who hold positions as directing editors of daily newspapers in the United States and Canada. The purposes of the Society

include assisting journalists and providing an unfettered and effective press in the service of the American people.

The Associated Press, founded in 1848, is world's oldest and largest newsgathering organization, providing content to more than 15,000 news outlets. Its multimedia services are distributed by satellite and the Internet to more than 120 nations.

The Association of American Publishers, Inc. (AAP) is the national association in the United States of publishers of general books, textbooks and educational materials. AAP's approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books and materials produced in the United States.

Belo Corp. is a media company with a diversified, market-leading group of television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.9% of U.S. television households, and publishes four daily newspapers with a combined daily circulation of approximately 900,000 and a combined Sunday circulation of almost 1.3 million in the United States. In addition, Belo owns or operates six cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes thirty-four internet websites, several interactive alliances and a broad range of Internet-based products.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of 1600 reporters in eighty-seven bureaus around the world, including two in California. Bloomberg News publishes more than 4000 news stories each day, electronically delivering business, financial

and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional System, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing business news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite television news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles a year; Bloomberg Magazines, which publishes twelve different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

CBS Broadcasting Inc. produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine shows, such as *60 Minutes* and *48 Hours*. CBS owns and operates broadcast television stations nationwide and, through a related company, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country.

Cable News Network LP, LLLP, a division of Turner Broadcasting System, Inc., an AOL Time Warner Company, is one the world's most respected and trusted sources for news and information. Its reach extends to fifteen cable and satellite television networks; twelve Internet websites, including CNN.com; three private place-based networks; two radio networks; and CNN Newsource, the world's most extensively syndicated news service. CNN's combined branded networks and services are available to more than one billion people in more than 212 countries and territories.

The California First Amendment Coalition, established in 1988, is a California nonprofit public benefit corp-

oration and a 501(c)(3) charitable organization whose purpose is to "promote and defend the people's right to know." Its board of directors includes representatives of the California Newspaper Publishers Association, California Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, and Associated Press News Executives Council, as well as public members with experience in government agencies, citizen interest groups and higher education.

California Newspaper Publishers Association is a trade association representing about 500 daily and weekly newspapers. The CNPA, for well over a century, has stood in defense of the rights guaranteed by the First Amendment.

The Copley Press, Inc. publishes nine daily newspapers, including *The San Diego Union-Tribune*, that regularly cover national and international news and operates an international news service.

Daily News, L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000, primarily in the New York City metropolitan area. The *Daily News* provides daily coverage of news events throughout the United States and the world. Its stories are also available on the Internet through its website, www.nydailynews.com.

Dow Jones & Company, Inc. is the publisher of, *inter alia*, *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, a news site on the world wide web with over 650,000 paying subscribers; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper of business and finance; and, through its Ottaway Newspaper, Inc. subsidiary, more than twenty daily and weekly newspapers.

Forbes, Inc. is the publisher of *Forbes*, the nation's leading business magazine and its international edition, *Forbes Global*, which together reach a worldwide audience of nearly five million readers. The company also publishes *Forbes FYI*, the irreverent lifestyle supplement. Other company divisions include: Forbes.com, the company's Internet business; Forbes Management Conference Group; Forbes Custom Communications partners; and American Heritage, publisher of *American Heritage* magazine and two quarterlies, *American Legacy* and *American Heritage of Invention & Technology*.

Fox Entertainment Group, Inc., through its subsidiaries, owns and operates the Fox News Channel, the Fox Broadcasting Company television network, and thirty-five local broadcast television stations that gather, produce and report news to the public.

Freedom Communications, Inc., headquartered in Irvine, California, is a diversified media company of newspapers, television broadcast stations and Internet-based businesses.

Freedom to Read Foundation ("FTRF") is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and to help shape legal precedent for the freedom to read on behalf of all citizens.

Gannett Company, Inc. is an international news and information company that publishes ninety-four daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including USA TODAY, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including USA WEEKEND, a

weekly newspaper magazine with a circulation of 23.6 million. The company also operates more than one hundred web sites and a national news service. Gannett's twenty-two television stations cover 17.7 percent of the United States.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Magazine Publishers of America, Inc. is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests, avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

The McClatchy Company publishes eleven daily newspapers and thirteen non-daily newspapers in California and other states including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina and *The Fresno Bee*. The newspapers have a combined average circulation of 1.4 million daily and 1.9 million on Sunday.

National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade organization

that serves and represents radio and television stations and networks. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning commercial activities and the activities of government.

National Broadcasting Company, Inc. is a diversified media company that produces and distributes news, entertainment and sports programming via broadcast television, cable television, the Internet and other distribution channels.

National Public Radio, Inc. (NPR) is a non-profit organization incorporated in the District of Columbia. It is a membership organization composed of more than 680 public radio stations located throughout the United States and serves a growing broadcast audience of over 19 million Americans weekly. NPR gathers and reports the news through its award winning programs, including *Morning Edition*, *All Things Considered*, and *Talk of the Nation*. It also distributes its broadcast programming on-line, adding additional news features, and distributes its broadcasts worldwide through satellite and cable distribution, and to U.S. military installations via the American Forces Network.

The New York Times Company publishes *The New York Times*, a national newspaper distributed throughout New York State and the world. Its weekday circulation is the third highest in the country at approximately 1.1 million, and its Sunday circulation is the largest at approximately 1.7 million. The Company also publishes sixteen other newspapers, including *The Boston Globe*, and owns and operates eight television stations and two radio stations.

Newspaper Association of America is a nonprofit organization representing more than 2,000 newspapers in the

United States and Canada. NAA members account for nearly 90% of the daily circulation in the United States and a wide range of non-daily U.S. newspapers.

Newsweek, Inc., a subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally.

PR Newswire Association LLC, www.prnewswire.com, a subsidiary of United Business Media plc, provides electronic distribution, targeting and measurement services on behalf of some 40,000 customers worldwide who seek to reach the news media, the investment community and the general public with their up-to-the-minute, full-text news developments. Established in 1954, PR Newswire has offices in fourteen countries and routinely sends its customers' news to outlets in 135 countries in twenty-seven languages. Utilizing the latest in communications technology, PR Newswire content is considered a mainstay among news reporters and investors as well as increasing numbers of private individuals.

Radio-Television News Directors Association (RTNDA) is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news executives in broadcasting, cable and other electronic media in more than thirty countries.

Reed Elsevier Inc. is a prominent publisher of information products and services for the business, professional and academic communities, including scientific journals, legal, educational, medical and business information, refrence books and textbooks, and business magazines.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The Seattle Times Company publishes four newspapers in the State of Washington: *The Seattle Times*, Washington's most widely circulated daily newspaper; the *Yakima Herald-Republic*; the *Walla Walla Union Bulletin*; and *The Issaquah Press*. It also publishes four newspapers in Maine: the *Portland Press Herald/Maine Sunday Telegram*, Maine's largest daily newspaper; the *Kennebec Journal*; the central Maine *Morning Sentinel*; and the *Coastal Journal*.

Silha Center for the Study of Media Ethics and the Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media.

Society of Professional Journalists (SPJ) is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Time Inc. is the largest publisher of general interest magazines in the world, publishing over 135 magazines in the United States and abroad. Its major titles include *Time, Fortune, Sports Illustrated, People, Money,* and *Entertainment Weekly.* Time Inc. is indirectly wholly-owned by AOL Time Warner Inc.

Tribune Company, through its publishing, broadcasting, and interactive operations, publishes eleven market-leading newspapers including the *Los Angeles Times, Chicago Tribune, Baltimore Sun, Newsday, Orlando Sentinel,* and *Hartford Courant*; owns and operates twenty-four major market television stations including KCPQ and KTWB (Seattle), KXTL (Sacramento), KTLA (Los Angeles), and KSWB (San Diego), and two radio stations; and operates a network of local and national n ws and information websites throughout the United States.

U.S. News & World Report, L.P. publishes *U.S. News & World Report*, a weekly, national newsmagazine devoted to investigative journalism, reporting and the analysis of national and international affairs, politics, business, health, science, technology, and social trends. Through its rankings of America's Best Colleges, America's Best Graduate Schools and America's Best Hospitals as well as its News You Can Use brand, *U.S. News* has earned a reputation as the leading provider of service news and information. *U.S. News* is rated the most credible newsweekly by the Pew Research Center for the People & the Press. *U.S. News* is available online at www.usnews.com.

The Washington Post Company publishes the newspaper *The Washington Post,* a daily newspaper with a nationwide daily circulation of over 782,000 and a Sunday circulation of over 1.06 million.

APPENDIX B

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FEB 28 2003

No. 02-575

In The

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of California

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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Goldberg v. Cablevision Sys. Corp., 261 F.3d 318 (2d Cir. 2001) 6

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Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894 (9th Cir. 2002) 5

NAACP v. Button, 371 U.S. 415 (1963) 10, 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10

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Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986) 10

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United States v. United Foods, Inc., 533 U.S. 405 (2001) 5, 12

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 5, 8, 14

Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849 (Ky. 2002) 15

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Cal. Code of Civ. Proc. § 1021.5 (West 2003) 17

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A "Sleazy" Attack, Wall St. J. Eur., Feb. 19, 1997, at 10, *available at* 1997 WL-WSJE 3806723 21

Ann Davis, *Plaintiffs: We'll Junk "Junk Science" Tag*, Nat'l L.J., Dec. 2, 1996, at A6, *available at* LEXIS, News Library, Papers File 21

TABLE OF AUTHORITIES – Continued

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Bonner R. Cohen, *Scaring Up Money with False Attacks on Science*, Knight Ridder/Trib. Bus. News, Sept. 20, 2000, *available at* LEXIS, News Library, Papers File 21

Charles Ornstein, *Norplant Company Agrees to Settle Suits*, Dallas Morning News, Aug. 26, 1999, *available at* LEXIS, News Library, Papers File 24

David K. Martin, *Truth Prevails Over "Junk Science"*, Chi. Trib., Sept. 2, 1998, at 25, *available at* 1998 WL 2891543 21

Gina Kolata, *Panel Confirms No Major Illness Tied to Implants*, N.Y. Times, June 21, 1999, at A1, *available at* 1999 WL 30483238 22

Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. Times, May 28, 1995, § 3, at 1, *available at* LEXIS, News Library, Northeast File 23

James R. Healey & David Kiley, *PR Company Comes Up with 2 Campaigns Taking SUVs to Task*, USA Today, Jan. 24, 2003, at 3B, *available at* LEXIS, News Library, Major Papers File 20

Leslie Laurence, *Your Perfect Birth Control . . . Blocked?*, Glamour, Sept. 1999 23

Michael Fumento, *A Confederacy of Boobs: How Special Interests, Assorted Ideologues, and a Sensationalist Press Torpedoed Breast Implants and Now Threaten Other Medical Devices*, Reason Magazine, Oct. 1995, *available at* LEXIS, News Library, Magazine File 21

TABLE OF AUTHORITIES – Continued

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Michael Fumento, *Dwindling Implant Returns*, Wash. Times, Dec. 28, 1998, at A17, *available at* 1998 WL 3467312 21

Michael Fumento, *The FDA's Panel Did Not Recommend the Ban of Silicone Breast Implants*, Wash. Times, Jan. 21, 1999, at A18, *available at* 1999 WL 3076271 21

Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom (Basic Books 1991) 19

Peter W. Huber, *Junk Science in the Courtroom*, Forbes, July 8, 1991, at 68, *available at* 1991 WL 2802206 20

Peter W. Huber, *Manufacturing the Audi Scare*, Wall St. J., Dec. 18, 1989, *available at* 1989 WL-WSJ 457495 19

Walter Olson, *It Didn't Start with Dateline NBC*, Nat'l Review, June 21, 1993, *available at* http://www.walterolson.com/articles/crashtests.html 19

STATEMENT OF INTEREST[1]

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 129 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 600 briefs as amicus curiae in both state and federal courts, including this Court, to present the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law, particularly as it affects product liability. A list of PLAC's corporate members is appended to this brief.

This case does not concern product liability law *per se*, but nonetheless is of particular importance to PLAC's members. Like all large institutions, PLAC's members have critics (and supporters) both in the public and in the press corps. The business of PLAC's members frequently becomes the focus of media attention. PLAC's members

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

also from time to time are defendants in high-profile lawsuits.

PLAC's members must be able to respond to the attacks made on them in the press and elsewhere. If those responses could routinely give rise to lawsuits, much like the lawsuit here, PLAC's members would be deterred from responding to public attacks, even when those attacks are frivolous. Such chilling of corporate speech not only would deprive PLAC's members of their constitutional right to speak in their own defense, but also would impoverish the public debate on important issues.

SUMMARY OF ARGUMENT

PLAC submits this brief for two purposes. First, PLAC explains why the Court should adhere to its established definition of commercial speech as "speech that does no more than propose a commercial transaction." (That definition will be referred to herein as the "no more than" definition.) Second, PLAC describes how the California court's decision, unless reversed, will be abused by the plaintiffs' bar. PLAC is uniquely qualified to present an analysis relating to plaintiffs' lawyers, as much of its work during the past two decades has involved advocacy against certain strategies and tactics used by the plaintiffs' bar.

This case provides an opportunity for the Court to reinforce its adherence to the "no more than" definition. Plaintiff conceded below that, if Nike's challenged statements are not commercial speech, then his complaint should be dismissed. Nike's statements could not be characterized as commercial speech under this Court's "no more than" definition. The Supreme Court of California,

however, disregarded that definition. Instead, it created a new definition that expands the commercial speech category to include virtually any statement that a company makes about itself, its products or its services, regardless of the venue in which the statement is made. This case should be resolved by rejecting the California court's unprecedented definition, and by reaffirming the "no more than" definition.

The "no more than" definition is broad enough so that it serves the underlying purpose of the commercial speech exception to general First Amendment principles. Commercial speech receives less than full constitutional protection because it is inextricably tied to commercial transactions, an area traditionally subject to the police power. Thus, it is perfectly logical that the commercial speech exception should extend only to speech that does no more than propose a commercial transaction.

Further, the "no more than" definition is narrow enough so as to not lead to inadvertent suppression of speech deserving of full First Amendment protection. In particular, that definition excludes speech that is part of the public discourse. The First Amendment forbids government from silencing voices in the public discourse, regardless of whether the speakers are commercial or noncommercial entities.

Moreover, reaffirmation of the "no more than" definition will not compromise government's legitimate exercise of its power to regulate health and safety statements on products. Members of this Court recently have expressed concern about whether that power will be limited unduly by commercial speech law. To the contrary, reinforcement of the "no more than" definition will enhance public

knowledge about product health and safety issues, by ensuring that the public hears from all knowledgeable and interested parties on those issues.

Turning to the second purpose of this brief, PLAC describes below how the California court's decision will provide an unacceptable boon to the plaintiffs' bar. Unless that decision is reversed, the plaintiffs' bar will release a torrent of abusive claims under California's Unfair Competition Law. Those claims will not benefit anyone but the plaintiffs' bar, and will cost our nation both socially and economically.

The decision below also should be reversed because it otherwise will cause the plaintiffs' bar to increase its extrajudicial use of the media to gain an advantage in litigation. The plaintiffs' bar has a long-standing practice of using the media to influence judges, potential jurors, and regulators on product safety issues. With the knowledge that the California court's decision will chill the countervailing speech of corporate speakers, the plaintiffs' bar will feel free to step up its use of the media.

In short, the decision below contradicts this Court's commercial speech law, will impoverish the public discourse on important issues, and will benefit nobody except plaintiffs' lawyers. The decision should be reversed.

ARGUMENT

I. THIS COURT SHOULD REITERATE AND REINFORCE ITS DEFINITION OF COMMERCIAL SPEECH AS "SPEECH THAT DOES NO MORE THAN PROPOSE A COMMERCIAL TRANSACTION"

A. Precedent Supports Continued Use of the "No More Than" Definition, and Provides No Justification for the California Court's Definition

A consistent definition of "commercial speech" has emerged from this Court and the federal circuit courts. Commercial speech is "speech that does no more than propose a commercial transaction."

The Court adopted the "no more than" definition in its seminal commercial speech case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Although the Court has experimented with other definitions, it returned to and settled on the "no more than" definition in its two most recent commercial speech decisions. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 122 S. Ct. 1497, 1503 (2002); *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (stating commercial speech is "usually defined as speech that does no more than propose a commercial transaction"); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993).

The federal circuit courts, obligated as they are to follow this Court, generally have understood the "no more than" definition to be controlling. *See, e.g., Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more

than propose a commercial transaction – then it is entitled to full First Amendment protection."); *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 326 (2d Cir. 2001); *CPC Int'l, Inc. v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232-33 (10th Cir. 1999); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1143-44, *amended by* 160 F.3d 541 (9th Cir. 1998).

The California court, however, disregarded this Court's definition and instead invented a complicated three-part test. Under that test, three elements must be considered: the speaker, the intended audience, and the content of the message. All three elements are described in extraordinarily broad terms by the court.

First, the "speaker" element of the test will be met whenever the speaker is "someone engaged in commerce" or "someone acting on behalf of a person so engaged." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 960 (Cal. 2002).

The second element – the "intended audience" for the speech – is similarly broad. This element is satisfied if the intended audience is "likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers." *Id.*

The third element – the "content" of the speech – is satisfied if the "speech consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker's products or services." *Id.* at 961. All a plaintiff's lawyer would have

to allege is that every statement made by a corporation is for the ultimate purpose of promoting sales.

Practically speaking, the California court's test would include virtually any statement made by a commercial enterprise concerning itself, or its products or services, that likely will be heard by, or repeated to, potential customers. That definition arguably would cover a wide range of statements that have nothing to do with the proposal of a commercial transaction – such as a company's statements about the effect of proposed regulations on its business, its responses to a reporter writing a story about the environmental or health impact of the company's manufacturing processes, and its statements to the press about a pending lawsuit. As Justice Chin explained in his dissent below, the majority's broad definition of commercial speech impermissibly contradicts this Court's "no more than" definition. *Id.* at 973-74.

In sum, the overwhelming weight of authority supports application of the "no more than" definition in this case, and rejection of the California court's unprecedented definition. The next section of this brief explains why the "no more than" definition is not only controlling, but also correct.

B. The "No More Than" Definition Serves the Underlying Purpose of the Commercial Speech Doctrine

In order to understand why the "no more than" definition makes sense, it is necessary to consider the underlying justification for the commercial speech doctrine. That doctrine is an exception to the usual rule that all content-based restrictions on speech are presumed

unconstitutional and reviewed under a strict scrutiny standard. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 387-88 (1992). Justice Stevens summarized the reasons for that exception in the principal opinion in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996):

> [T]he State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is "linked inextricably" to those transactions. [*Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)] (commercial speech "occurs in an area traditionally subject to government regulation"). As one commentator has explained: "The entire commercial speech doctrine, after all, represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." [Laurence H. Tribe, *American Constitutional Law* § 12-15, at 903 (2d ed. 1988)].

Thus, the sole justification for government's extraordinary power to regulate commercial speech is the relation of that speech to commercial transactions. The "no more than" definition fits perfectly with that justification. Speech is covered by the "no more than" definition only when it is part and parcel of a commercial transaction.

The classic example of speech that falls within the "no more than" definition is set forth in *Virginia State Board*: "'I will sell you the X prescription drug at the Y price.'" 425 U.S. at 761. Such speech is integral to the proposed commercial transaction. The likely response to the example from *Virginia State Board* is purely economic conduct – the consumer either will buy or not buy that prescription

drug. As discussed below, however, speech that goes beyond the mere proposal of a commercial transaction is more likely to be responded to with additional speech, not just economic conduct, and so must receive full constitutional protection.[2]

C. The "No More Than" Definition Properly Excludes Speech that Is Part of a Public Discussion or Debate

Fundamental First Amendment values are put at risk by a definition of commercial speech broader than the "no more than" definition. When a speaker's message does more than propose a commercial transaction, that message may be the first step in a public discussion. Protection of such discussion is at the heart of the First Amendment. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980). As this Court has explained, the First Amendment removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California*, 403 U.S. 15, 24 (1971).

This case provides a helpful illustration of these principles. Plaintiff does not dispute that Nike's statements do more than propose a commercial transaction. Those statements are part of a public discussion between

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[2] Because PLAC believes Nike's speech is noncommercial, it does not express an opinion herein as to whether commercial speech should receive full constitutional protection.

Nike, its critics, and its supporters about labor conditions in overseas factories where Nike's products are manufactured and, more generally, about the impact of American corporations on labor conditions in the developing world. Such public discussion clearly warrants full First Amendment protection. As this Court has stated, "[f]ree discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

The California court, however, has created a new definition of commercial speech that would allow judges in California to interfere with public discussion based on their view of truth and falsity. In this case, plaintiff asks the California judiciary to restrain Nike's speech based on plaintiff's allegations that Nike has introduced false statements into the public debate about overseas labor conditions. But this Court has declared that, "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Moreover, the constitutional presumption against governmental interference with public debate does not vary based on the commercial motivation of a participant in that debate. No doubt, Nike has a commercial motivation in defending its labor practices. But "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1,

8 (1986) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). If statements from a commercial speaker are deserving of less weight, that is for the audience to decide, not the government. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." *Bellotti*, 435 U.S. at 791-92; *see also Consol. Edison*, 447 U.S. at 534.

The threat posed by plaintiff's argument is not limited to direct interference with ongoing public debate, but also includes the danger that commercial entities will be deterred from even entering the debate. *See Button*, 371 U.S. at 433 ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions"). The speech of corporations, just like that of individuals, is chilled by the risk of court-imposed liability for that speech. *Bellotti*, 435 U.S. at 786 n.21. Management often would choose not to take such a risk and "[m]uch valuable information which a corporation might be able to provide would remain unpublished." *Id.* "'[T]he free dissemination of ideas [might] be the loser.'" *Id.* (brackets in original; citations omitted).[3]

In sum, the "no more than" definition of commercial speech appropriately excludes speech that is critical to public discussion and debate. If this Court were to abandon that definition, it would become far easier for government –

[3] Importantly, PLAC does not argue that commercial entities should be immune from liability for their false advertising. Companies can be sued for false advertising under the UCL, the Lanham Act or the FTC Act.

and plaintiffs' lawyers acting in the name of government – to silence the voices of commercial entities, voices that are particularly important in our free market economy. For this reason alone, the California court's unprecedented and overbroad definition of commercial speech should be rejected.

D. Reaffirmation of the "No More Than" Definition Will Not Unduly Restrict Government's Regulation of Health and Safety Statements

One aspect of the definitional issue, although not implicated directly by this case, merits special attention. Members of this Court have expressed concern recently about the interaction between the commercial speech doctrine and the government's ability to regulate health and safety statements on products. *See W. States Med. Ctr.*, 122 S. Ct. at 1509-10 (Breyer, J., dissenting); *United Foods*, 533 U.S. at 428 (Breyer, J., dissenting). Reaffirmation of the "no more than" definition, however, will enhance, not reduce, public knowledge about the health and safety of products.

A question that could be raised about the "no more than" definition is whether corporate statements about health and safety will be deemed to fall outside that definition, and instead be categorized as fully protected speech. The answer is that most corporate statements about health and safety, when made in the context of a commercial transaction, should qualify as commercial speech under the "no more than" definition. Put another way, and as discussed more fully below, commercial speech law generally should apply to both regulations that restrict what companies can say and regulations that require

disclosures by companies about health and safety issues. These two types of regulations will be considered in turn.

The "no more than" definition, by its terms, includes statements that a company makes to consumers to persuade them to buy a particular product. Such statements are part of the proposal of a commercial transaction. Thus, when a company tells consumers something about the health or safety of its product in connection with its proposal that they buy the product, those statements qualify as commercial speech. It follows that government could regulate such statements, to make sure that they are not actually or potentially misleading, subject to the lesser First Amendment scrutiny accorded commercial speech under the *Central Hudson* test.

The same result should apply to governmental regulations designed to prevent misleading omissions of health or safety information. The analysis would be that, absent the mandated disclosure, the proposal of the commercial transaction will be misleading. Again, such mandated disclosures should be reviewed by the courts under *Central Hudson*.[4]

Strict scrutiny, and not *Central Hudson*, should apply, however, when government attempts to restrict what a corporation says about health and safety issues outside of

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[4] This analysis assumes that the mandated disclosure is not a matter of common knowledge. If the disclosure were common knowledge, then it would not serve to protect the public from being misled. Any attempt by government to require a company to make a disclosure that either is common knowledge, or that is otherwise not designed to protect the public from being misled, should be reviewed under strict scrutiny. *See Wooley v. Maynard*, 430 U.S. 705 (1977).

the context of the proposal of a commercial transaction. For example, government should have to satisfy strict scrutiny review if it wishes to prohibit companies from answering press inquiries about product safety issues.

By excluding such speech from the category of commercial speech, the "no more than" definition serves to enhance public knowledge about health and safety issues. An uninhibited debate about those issues that includes all interested and knowledgeable participants will lead, our constitutional system assumes, to the discovery of truth. *See Virginia State Bd.*, 425 U.S. at 770. For example, in the instant case, the public's search for truth will be aided by hearing the views of both Nike and its opponents with respect to the safety of labor conditions in overseas factories.

Thus, this Court's continued reliance on the "no more than" definition will not limit unduly the government's ability to regulate health and safety information and, in fact, will enrich the public discourse on those issues. The next section discusses an additional reason why the Court should adhere to the "no more than" definition – the inevitability that any broader definition would lead to abusive conduct and litigation by the plaintiffs' bar.

II. THE CALIFORNIA COURT'S DECISION, IF UPHELD, WILL PROVIDE AN UNACCEPTABLE BOON TO THE PLAINTIFFS' BAR

The California Court's decision bolsters plaintiffs' lawyers in two unacceptable ways. First, the decision expands the ability of plaintiffs' lawyers to commence frivolous, yet potentially lucrative, lawsuits under California's Unfair Competition Law ("UCL"). Second, and no less

importantly, the decision below enables the plaintiffs' bar to step up its practice of trying its lawsuits in the media.

A. The Decision Below Creates a New Category of Lucrative Lawsuits that Primarily Will Benefit Plaintiffs' Lawyers

Too many lawsuits in America are brought by lawyers seeking to line their own pockets, rather than serve the interests of the named plaintiffs. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied sub nom. Gustafson v. Bridgestone/Firestone, Inc.*, 123 S. Ct. 870 (2003) (decertifying class of purchasers of allegedly defective tires who had not suffered any physical injuries and who already had received free replacement tires); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002) (rejecting class action claim seeking "medical monitoring" of users of Phen-Fen who had no present physical injury). The decision below, if upheld, will enable plaintiffs' lawyers to churn out, with relative ease, numerous new lawsuits alleging false commercial speech in violation of the UCL.

Opportunistic plaintiffs' lawyers should have no problem finding *Kasky*-like claims to file. Corporations routinely speak in the press about controversial issues (although their speech likely will be chilled by the decision below). A creative plaintiffs' lawyer should be able to read a few newspapers in the morning and come up with at least one possible UCL claim to file by lunchtime.

The plaintiffs' bar will rely on *Kasky* not only to file stand-alone UCL claims, but also as an adjunct to their product liability lawsuits. The chain of events is easily foreseeable. First, a plaintiffs' firm will attract media

attention to its product liability lawsuits, in order to influence the potential jury pool and find additional plaintiffs whom it can represent. Next, the targeted corporation, like any person who is attacked in the press, will seek to defend itself (unless its speech has been chilled) by making its own truthful statements to the media. Corporations feel compelled to defend themselves because, if they do not, a portion of the public will presume that they are guilty, and shareholders could suffer a decline in the value of their investment.

After the corporation defends itself, the California court's decision will come into play. Empowered by that decision, the plaintiffs' firm will add a UCL claim to its complaint against the corporation, alleging that the corporation's statements to the media were false. It will add that claim with two unacceptable goals in mind – to deter the corporation from communicating with the public and as an additional pressure point to extract a settlement from the corporation. Unfortunately, both of those goals likely will be accomplished under current California law as articulated by the court below.

As a separate matter, the nature of the UCL will make it easy for plaintiffs' lawyers, emboldened by the *Kasky* decision, to file copycat actions. Unlike the "little FTC Acts" in most states, California's UCL allows citizens to act as private attorneys general. Cal. Bus. & Prof. Code § 17204 (West 2003). In other words, the UCL allows plaintiffs' lawyers to commence lawsuits even when they cannot locate a claimant who actually has been deceived or harmed by the allegedly false advertising. Plaintiff Kasky, for example, explicitly alleges in his complaint that he has suffered no damage whatsoever as a result of Nike's statements.

Moreover, a plaintiff who successfully prosecutes a UCL action in a representative capacity could seek an award of attorney's fees. Under section 1021.5 of the California Code of Civil Procedure, the courts are empowered to award attorneys fees to "a successful party . . . in any action which has resulted in the enforcement of an important right affecting the public interest." The possibility of a fee award will, no doubt, provide an additional incentive to the plaintiffs' bar to identify and file UCL claims that rely on the California Supreme Court's broad definition of commercial speech. It comes as no surprise that this lawsuit was brought by some of the most prominent plaintiffs' class action lawyers in the nation.

This Court, by reversing the California court's decision, will prevent the plaintiffs' bar from releasing a torrent of abusive UCL claims – claims that rarely would benefit anyone outside the plaintiffs' bar, and that would cost our nation both economically and socially. As explained below, a reversal also is necessary because the California court's decision enhances the ability of plaintiffs' lawyers to manipulate the media.

B. The Decision Below Encourages the Plaintiffs' Bar to Increase Its Use of the Media to Influence the Outcome of Litigation

Plaintiffs' lawyers have become increasingly adept at using the media to advance their lawsuits. To be fair, they sometimes publicize legitimate issues concerning product safety. But many times, allegations concerning product safety that are made by the plaintiffs' bar turn out to be false or misleading.

The history of use of the media by plaintiffs' lawyers provides a basis for predicting how they will take advantage of the decision below. In case after case, the plaintiffs' bar has turned to the media to influence potential jurors, the judiciary and regulators. While there certainly are lawyers of integrity in the plaintiffs' bar, there also are some who are more concerned about a payday than learning the truth about product safety issues. If the California court's decision is allowed to stand, these lawyers will not only continue to use the media to influence the outcomes of their lawsuits, but will be emboldened to step up their media campaigns, knowing that the threat of a UCL claim will chill the countervailing voices of manufacturers.

Numerous examples exist of product safety claims that were pushed forward in the media by the plaintiffs' bar and that ultimately were proven meritless – from "sudden unintended acceleration" in Audi cars, to the alleged dangers of silicone breast implants, Norplant, Alar, Bendectin, and power lines. The first three of these examples will be explored in more detail below so as to show the history of extrajudicial use of the media by plaintiffs' lawyers, and to foreshadow the sort of conduct that will occur if the California court's decision is not overturned.

1. Examples of Prior Use of the Media by the Plaintiffs' Bar to Influence Litigation

a. "Sudden Unintended Acceleration" by Audi Cars

During the summer of 1986, a few lawsuits were filed alleging that the Audi 5000 had a design defect that caused the cars to accelerate suddenly when the transmission was shifted out of park, even when the driver was

pressing on the brake. Those claims entered the national consciousness later that fall when a now notorious segment of "60 Minutes" was aired. The segment featured an Ohio mother who accidentally and tragically had run over her six-year-old son with her Audi 5000, and who claimed that she had her foot on the brake the whole time.[5]

Unbeknownst to the viewers, plaintiffs' lawyers were lurking behind the scenes of the "60 Minutes" segment. The broadcast relied heavily on an "expert" on automobile safety named William Rosenbluth. But Rosenbluth did not disclose in the segment that he already had been retained by lawyers who were representing the Ohio family in its lawsuit against Audi. Moreover, Rosenbluth misled viewers when he performed a demonstration on "60 Minutes" of an accelerator pedal moving down apparently by itself. Rosenbluth, the expert hired by a plaintiffs' firm, had drilled a hole in the car's transmission and pumped in air or fluid so that the accelerator pedal would be depressed without the assistance of a human foot.[6]

The "60 Minutes" program created tremendous publicity and sympathy for the "sudden unintended acceleration" theory. By 1989, Audi was facing more than one hundred lawsuits seeking combined damages totaling

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[5] *See* Peter W. Huber, *Manufacturing the Audi Scare*, Wall St. J., Dec. 18, 1989, *available at* 1989 WL-WSJ 457495; Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom 559-62 (Basic Books 1991).

[6] *See id.*; Walter Olson, *It Didn't Start with Dateline NBC*, Nat'l Review, June 21, 1993, available at http://www.walterolson.com/articles/crashtests.html.

$5 billion.[7] Demand for Audi vehicles plummeted and some dealers went out of business.

Eventually, the real facts came out. Comprehensive reviews by the National Highway Traffic Safety Administration and its counterparts in Canada and Japan concluded that the cause of sudden acceleration in the Audi 5000 was not a design defect, but drivers who accidentally placed their feet on the wrong pedal.[8]

Because the "sudden unintended acceleration" claims were made in the pre-*Kasky* era, Audi did not hesitate to refute the claims in the press. If the California court's decision were on the books at that time, however, Audi might have been chilled from expressing its views for fear that its comments could give rise to a UCL claim. Likewise, unless the decision below is reversed, unscrupulous plaintiffs' lawyers will be encouraged by that decision to continue their misleading submissions to the media, believing that the party best suited to rebut misleading claims about a product's safety – the manufacturer – will choose silence rather than risk a UCL claim.

b. Silicone Breast Implants

Silicone breast implants were the subject of a health scare throughout the 1990s. The scare started in 1990 when Connie Chung ran a segment on her show alleging

[7] Peter W. Huber, *Junk Science in the Courtroom*, Forbes, July 8, 1991, at 68, *available at* 1991 WL 2802206.

[8] *Id.*; James R. Healey & David Kiley, *PR Company Comes Up with 2 Campaigns Taking SUVs to Task*, USA Today, Jan. 24, 2003, at 3B, *available at* LEXIS, News Library, at Major Papers File.

that the implants cause autoimmune, neurological and other diseases. Within the following four years, an avalanche of lawsuits was filed against the various manufacturers of the implants. For example, Dow Corning was named as a defendant in approximately 20,000 lawsuits.[9]

But by the mid-1990s, the plaintiffs' lawyers had a problem. The public was becoming increasingly convinced that the breast implant litigation rested on "junk science."[10] To save their lawsuits, the plaintiffs' bar launched a nationwide media campaign designed to combat the "junk science" accusation.[11] They retained under a multimillion dollar contract a public relations firm named Fenton Communications.[12] Fenton had the right qualifications for the job, as it previously had been successful in attracting media attention and fomenting fear with respect to the Alar scare.[13]

[9] Michael Fumento, *A Confederacy of Boobs: How Special Interests, Assorted Ideologues, and a Sensationalist Press Torpedoed Breast Implants and Now Threaten Other Medical Devices*, Reason Magazine, Oct. 1995, *available at* LEXIS, News Library, Magazine File.

[10] Ann Davis, *Plaintiffs: We'll Junk "Junk Science" Tag*, Nat'l L.J., Dec. 2, 1996, at A6, *available at* LEXIS, News Library, Papers File.

[11] *Id.*

[12] *Id.*; David K. Martin, *Truth Prevails Over "Junk Science,"* Chi. Trib., Sept. 2, 1998, at 25, *available at* 1998 WL 2891543; Michael Fumento, *The FDA's Panel Did Not Recommend the Ban of Silicone Breast Implants*, Wash. Times, Jan. 21, 1999, at A18, *available at* 1999 WL 3076271; Michael Fumento, *Dwindling Implant Returns*, Wash. Times, Dec. 28, 1998, at A17, *available at* 1998 WL 3467312; *A "Sleazy" Attack*, Wall St. J. Eur., Feb. 19, 1997, at 10, *available at* 197 WL-WSJE 3806723.

[13] *A "Sleazy" Attack*, *supra* note 12, at 10; Bonner R. Cohen, *Scaring Up Money with False Attacks On Science*, Knight Ridder/Trib.

(Continued on following page)

The substantial financial investment made by the breast implant lawyers in their media campaign paid dividends. After hiring Fenton, the plaintiffs' lawyers dramatically improved their success rate in defending *Daubert* motions, and filled their pockets with million of additional dollars from settlements and judgments.

While the media campaign launched by the plaintiffs' bar served them well, it could not ultimately prevent the truth from being established. In 1999, Congress received a report from the Institute of Medicine, which it had asked to study the breast implant issue. The independent panel of 13 scientists reported that there is no reason to believe that the implants are toxic, cause harmful effects on the immune system, or give rise to a unique disease syndrome.[14]

The history of the breast implant litigation illustrates why the California court erred in depriving companies of the same level of First Amendment as is received by their attackers. No matter how much the plaintiffs' bar tries to characterize its tort lawsuits against large corporations as "David versus Goliath" stories, the truth is that the plaintiffs' bar is a gigantic industry unto itself. The plaintiffs' bar does not blink at spending millions of dollars on media efforts to support its lawsuits. Basic principles of fairness, as well as the public's interest in learning the truth, require that manufacturers receive the same level of

Bus. News, Sept. 20, 2000, *available at* LEXIS, News Library, Papers File (characterizing Fenton Communications as an expert at "fomenting fear among consumers" and noting its involvement in the Alar scare).

[14] Gina Kolata, *Panel Confirms No Major Illness Tied To Implants*, N.Y. Times, June 21, 1999, at A1, *available at* 1999 WL 30483238.

constitutional protection for their responses as do the plaintiffs' lawyers who sponsor those attacks.

c. Norplant

After the plaintiffs' lawyers put Dow Corning out of business, they targeted another product – Norplant. When it was launched in the early 1990s, Norplant – six tiny hormone-releasing rods that are implanted under the skin – was heralded as a breakthrough in contraception due to its 99 percent effectiveness in preventing pregnancy. But the tort lawyers soon swarmed around Norplant, bringing along with them many of the same medical experts and laboratories that had made money in the breast implant litigation.[15]

The plaintiffs' lawyers had honed their media strategy by the time they zeroed in on Norplant. They used billboards, television advertisements and media scare campaigns to recruit 50,0000 women to sue the manufacturer.[16] The expense associated with this media campaign was not a problem for the plaintiffs' lawyers, as they had accumulated a sizable war chest from their previous lawsuits.

The media hype, however, could not be justified by the "scientific" evidence collected by the plaintiffs' lawyers. The results in the litigation attest to the shoddy quality of that evidence. As of 1999, the manufacturer of Norplant

[15] Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. Times, May 28, 1995, § 3, at 1, *available at* LEXIS, News Library, Northeast File.

[16] Leslie Laurence, *Your Perfect Birth Control ... Blocked?*, Glamour, Sept. 1999.

had won three jury verdicts, 20 pretrial judgments, and the dismissal of 14,000 claims.[17] Last year, a United States District Judge sitting in Texas dismissed the claims of most remaining class members, finding that, "Plaintiffs have not produced a shred of evidence or expert testimony that supports an association between Norplant" and the diseases in question.[18]

The ongoing Norplant litigation shows that the plaintiffs' bar has not stopped using the media as part of its case strategy, and remains willing to commence massive tort litigation without solid scientific support for its claims. In this environment, it is especially important that the public hear the voices of those persons best suited to answer the allegations of the plaintiffs' bar. This is not the time for silencing the companies that have the incentive and knowledge to rebut junk science.

As demonstrated by the three examples discussed above, plaintiffs' attorneys consider extrajudicial use of the media to be one of the tools of their trade. Unless the California court's decision is vacated, plaintiffs' attorneys can be expected to ramp up their use of the media, knowing that their public statements are less likely to be challenged by the companies whom they sue. For the sake of promoting robust debates that ultimately reveal the

[17] Charles Ornstein, *Norplant Company Agrees to Settle Suits*, Dallas Morning News, Aug. 26, 1999, *available at* LEXIS, News Library, Papers File.

[18] *In re Norplant Contraceptive Prods. Liab. Litig.*, 215 F. Supp. 2d 795, 833 (E.D. Tex. 2002).

truth about the health and safety of products, the decision below should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Product Liability Advisory Council, Inc. respectfully asks this Court to reject the Supreme Court of California's unduly broad definition of commercial speech, reverse the decision below, and, in so doing, reiterate and reinforce its definition of commercial speech as "speech that does no more than propose a commercial transaction."

Respectfully submitted,

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Sunbeam Corporation

Synthes (U.S.A.)

Textron, Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Lincoln Electric Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.

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No. 02-575

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

NIKE, INC., *et al.*,

Petitioners,

—v.—

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Northern California is one of its regional affiliates. Since its founding in 1920, the ACLU has vigorously defended free speech rights and has appeared before this court in numerous First Amendment cases, both as direct counsel and as *amicus curiae*.

STATEMENT OF THE CASE

This case involves a private attorney general lawsuit initiated by respondent, Marc Kasky, against Nike, Inc. (Nike) under California's unfair competition and false advertising laws. Although respondent alleged no damages that inured directly to him, he sought an order requiring Nike to disgorge all monies it earned in California as a result of its allegedly unlawful conduct, as well as a court-approved public information campaign to correct its alleged misstatements, and an injunction prohibiting future misrepresentations regarding working conditions under which Nike products are made.

Nike is a major international corporation that produces athletic shoes and apparel. Many of its products are produced in Southeast Asia under conditions which are alleged to be dangerous and inhumane. These allegations

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

against Nike are part of a broader public debate over the ethical responsibilities of multi-national corporations in bringing products to the market place.

Starting in 1996, the nature of Nike's labor practices became a subject of enormous public interest and scrutiny brought on by a well-organized human rights campaign. The ensuing controversy was widely reported in the media in this country and abroad, much of it harshly critical of Nike's corporate practices. The public attention led to calls for boycotts and demands for legislative action in an effort to influence Nike's practices.

It was only in response to these allegations that Nike began publicly answering its critics, defending its overseas practices, and denying claims that it was operating sweatshops under supposedly slave-labor conditions. Nike officials responded to the charges through press releases, letters to the editor and op-eds in newspapers around the country, and letters to presidents and athletics directors of major universities. Nike also "purchased" editorial advertisements – i.e., paid political advertisements, to report the findings of an independent review of its labor practices that it had commissioned and which had cleared Nike of any abuses. None of these statements directly proposed a commercial transaction or promoted Nike's products. Nike's statements do no more than refute the accuracy of the charges leveled against it or argue mitigating circumstances. The respondent alleged that, in the course defending its practices, Nike violated California law by making false statements of fact about its labor practices and about the working conditions in factories that make its products.

Nike demurred to the complaint as barred by the First Amendment because the allegations failed to hue to the distinction between commercial speech that proposes a transaction and other varieties of speech that are fully protected – including corporate speech. The Superior Court

agreed and the California Court of Appeal unanimously affirmed. *Kasky v. Nike Inc.*, 93 Cal. Rptr. 854 (Cal. App. 2000). The California Supreme Court granted review, and, treating the allegations of the complaint as true because the case was before it on a demurrer, reversed. *Kasky v. Nike Inc.*, 27 Cal. 4th 939, 45 P.3d. 243 (2002). In a 4-3 opinion, the court held that Nike's statements were commercial speech and, therefore, subject to restrictions on false and deceptive advertising. In two separate opinions, the dissenting judges took issue with the majority's conclusions that Nike's statements were commercial speech and would have treated the statements as fully protected under the First Amendment in order to insure a full and balanced debate on a matter of obvious public concern.

SUMMARY OF ARGUMENT

In our system of government, courts are not arbitrators of truthfulness or probity, except in cases involving product advertising or where reputational interests are at stake. This case does not fit within either of these categories – indeed *amici* take no position on the truthfulness of the statements made by Nike. But, we strongly believe that the dispute over Nike's overseas labor practices should be resolved through public debate and not in a courtroom. While the parties disagree on whether the California statute at issue imposes strict liability or requires some showing of fault, the respondent's position is extraordinarily far reaching. If Nike's speech here can be characterized as commercial, then it can presumably lead not only to civil liability, but also to an injunction prohibiting further "false or misleading" statements defending or discussing its overseas working conditions and practices. Just as this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), struck down a broad definition of libel that hobbled the First Amendment by shielding public officials from criticism and

discussion of their actions, so too in this case the Court should not allow First Amendment rights to be diluted through an expanded definition of commercial speech.

The decision of the California Supreme Court opens that door. Whether one focuses on the speaker or listener in the exchange, we do not believe that the speech at issue in this case can properly be treated as commercial speech – and subject to diminished First Amendment protection. Although this case involves a public relations campaign, Nike's interest in telling its side of the story in a nationwide debate focusing attention on alleged abuses at its overseas workplaces is no less entitled to full First Amendment protection than statements made by those who have leveled charges critical of Nike's employment practices. The public also has a compelling First Amendment interest in hearing a balanced debate. The rigid distinction between commercial and non-commercial speech adopted by the court below distorts that debate by holding one side of the dispute more accountable than the other for the accuracy of its statements based solely on the identity and economic interests of one of the speakers.

The government's interest in regulating product advertising is limited to protecting the consumer from the commercial aspects of the speech proposing a transaction and does not extend to the broader goal of suppressing all corporate speech or all speech having some commercial aspect. We do not dispute that information about Nike's labor practices may be important to many consumers and a factor in their purchasing decisions, but that is primarily because consumers are seeking to use their economic power to make a broader political and economic statement. This is the function of the marketplace of ideas in a free society. Thus, unlike many of the Court's decisions upholding limitations on commercial speech where the speech interest is subordinate to the economic transaction being proposed, here the commercial aspect is subordinate to the non-

commercial aspect of the speech. Moreover, this is true from the point of view of both the speaker, who seeks to be part of the public debate over its overseas practices, and the consumer who may seek to influence Nike's actions through its purchasing decisions.

The bright line distinction between fully protected speech with a subordinate commercial aspect and other types of commercial speech that do no more than propose a transaction is evident in the Court's many cases involving labor disputes, consumer boycotts, charitable solicitation, the sale of religious and political material, and the solicitation of clients for civil rights and other advocacy litigation. The lower court's formulation of the commercial/non-commercial speech distinction is also at odds with this Court's decisions giving full protection to corporate speech motivated by economic self interest. Where, as here, the listener's interest may involve the exercise of political choice, and is not limited to his interest in purchasing the best product for the best price, the First Amendment interests at stake are even greater.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976), is the seminal commercial speech case. There the Court explained that the rationale for extending First Amendment protection to commercial speech is to ensure that consumers have the information they need to buy safe products at competitive prices. But the rationale also defines the appropriate boundaries of the commercial speech doctrine and the enhanced government regulation it permits. The regulation at issue in *Virginia Pharmacy* banned prescription drug advertising. The consumer's interest in that information ended with the economic transaction. Here, the information at issue is valuable to consumers primarily because it enables them to use their economic buying power to pursue a larger political and societal goal. The use of economic power for political ends is both a traditional and an entirely legitimate

tactic. It is, nonetheless, a political tactic and the speech that informs it should be treated as political speech under the Court's First Amendment jurisprudence. Indeed, this Court has already recognized as much in the context of labor boycotts, *Thornhill v. Alabama*, 310 U.S. 88 (1940), and civil rights boycotts, *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886 (1982). Respondents do not quarrel with those decisions but see them as only a one way ratchet available to those challenging corporate practices and not to those who defend them. Such viewpoint discrimination is, of course, an anathema under the First Amendment. It also demonstrates how far afield the lower court decision strays from the traditional regulation of advertising – which involves almost by definition a one-sided communication (that invites no response) rather than the sort of public debate at issue here.

ARGUMENT

The Decision Below Improperly Extends the Commercial Speech Doctrine to Justify the Suppression of Speech in Violation of Core First Amendment Principles

"The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 (1984). It is for that reason that debate on matters of public concern lies at the very heart of the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758-59 (1985); *Connick v. Meyers*, 461 U.S. 138, 145 (1983). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Connick*, 461 U.S. at 145 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). However, the debate on matters of public concern can fulfill its purpose in a democratic society only if it is free and unfettered. Under our constitution, "there in no such thing as a false idea. However

pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Bose Corp. v. Consumers Union* 466 U.S. at 504 (quoting *Gertz v. Roberts Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Thus, it is " '[t]he very purpose of the First Amendment...to foreclose public authority from assuming a guardianship of the public mind....'" *Riley v. Nat'l Federation of the Blind*, 487 U.S. 781, 791 (1988) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

The constitutional value served by commercial speech is different. Commercial speech is protected to safeguard the consumer's interest in "the free flow of information and ideas." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); *accord Central Hudson Gas & Electric Co. v. Public Service Commission*, 447 U.S. 557, 563 (1980); *Linmar Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977); *Virginia Pharmacy*, 425 U.S. at 764. With commercial speech it is the interest of the listener that is paramount, rather than that of the speaker.

In the present case, the challenged communications were part of a nationwide debate in which consumers were being asked to make a political choice about whether or not to boycott Nike products, and to think more broadly about the role and responsibilities of multinational corporations in a global economy. The timeliness and significance of that discussion is clear. *See Thornhill*, 310 U.S. at 102-03. It is equally clear from this Court's decisions that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values," and is entitled to special protection, *Connick*, 461 U.S. at 145 (quoting *NAACP v. Clairborne Hardware Co.*, 458 U.S. at 913-14), regardless of the economic self-interest that may motivate the speaker. *See Thornhill v. Alabama*, 310 U.S. at 102-03; *First National Bank of Boston v. Bellotti*, 437 U.S. 765, 791-92 (1978) ("the

people in our democracy are entrusted with the responsibility for judging and evaluating the merits of conflicting viewpoints"). Nike's First Amendment right to participate in this debate and defend its practices is qualitatively different from its interest in merely proposing a commercial transaction. *Bellotti*, 437 U.S. at 784-85; *Consolidated Edison Co. v. New York Public Service Commission*, 447 U.S. 530, 535 (1980) (The utility's "discussion of controversial issues strikes at the heart of the freedom to speak."). *See also Virginia Pharmacy*, 425 U.S. at 262-63 (recognizing that it has long been settled by *Thornhill* and other cases that the contestants in a labor dispute are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome). The offense to the First Amendment is heightened where, as here, the suppression of speech targets one side of the debate. *See Bellotti*, 435 U.S. at 785-86.

While we are of course mindful of the limits that may be placed on false or deceptive product advertising, *see Virginia Board of Pharmacy*, 425 U.S. at 771, those limits cannot justify the regulation of speech concerning public affairs unrelated to product sales. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *New York Times v. Sullivan*, 376 U.S. at 269. The concerns that typically justify regulation of transaction-driven speech are completely absent in this case. In particular, there is little risk that this debate, which is taking place in the public arena and not at the point of sale, will lead consumers to "respond to the [alleged] falsehood before there is time for more speech and considered reflection...." *See Rubin v. Coors Brewing Company*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). For these reasons, the decision below should not be affirmed on the paternalistic grounds that the debate over Nike's practices cannot be

sorted out in the marketplace of ideas rather than in the courtroom.

In order to show how anomalous this case is we begin our analysis with a discussion of the Court's cases invalidating restrictions on product advertising that deprive the consumer of important product information that the state may not withhold. *Virginia Pharmacy*, 425 U.S. at 762; *Linmark*, 431 U.S. at 96-97; *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Bolger v. Youngs Drugs Product Corp.*, 463 U.S. 60 (1983); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). What emerges from these cases is the principle that, while the government can insist that information related to the transaction be truthful and non-misleading, there remains a significant measure of First Amendment protection even for speech involving core product advertising, which does no more than propose a commercial transaction. *Central Hudson*, 447 U.S. 557.

In *Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975), the Court held that it is error to assume that commercial speech is entitled to no First Amendment protection or that it was without value in the marketplace of ideas. Subsequently, in *Virginia Bd. of Pharmacy, supra*, the Court expanded on its holding in *Biglow* and held that the state's blanket ban on advertising prescription drugs violated the First Amendment. The Court asserted that a "particular consumer's interest in the free flow of commercial information... may be as keen, if not keener by far, than his interest in the day's most urgent political debate," 425 U.S. at 763, and that "the proper allocation of resources" in our free enterprise system requires that consumer decisions be "intelligent and well informed." *Id.* at 765. The Court also explained that, unless consumers are kept informed about the operations of the free market system, they cannot form "intelligent opinions as to how the system ought to be regulated or altered." *Id.*

The opinion further explained that the State's paternalistic assumption that consumers will use commercial information unwisely cannot justify its decision to suppress it:

> There is of course an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well informed, and that the best means to that end is to open the channels of communication rather than to close them.

Id. at 770.

The Court reiterated this concern with the free flow of information in *Bates v. State Bar of Arizona*, 433 U.S. at 364-65 (rejecting the state's "paternalistic" approach that suppresses information in an effort to control consumer choices); *Central Hudson*, 447 U.S. at 561-62 ("[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information"); and in *Bellotti*, 435 U.S. at 783 ("[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interests in the 'free flow of commercial information'") (quoting *Virginia Pharmacy*, 425 U.S at 764). In *Rubin v. Coors Brewing Co.*, the Court recently reaffirmed the importance of "the free flow of commercial information" and repeated the observation of *Virginia Pharmacy* that the citizen's interest in such information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 514 U.S. at 481-82.

On the basis of these principles, the Court has uniformly struck down several broadly based bans on

commercial speech, each of which served ends unrelated to consumer protection. Indeed, one of those cases expressly likened the rationale that *Virginia Bd. of Pharmacy* employed to the one that Justice Brandeis adopted in his concurrence in *Whitney v. California*, 274 U.S. 357 (1927). *See Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 97. In *Whitney*, Justice Brandeis wrote, in explaining his objection to a prohibition of *political* speech, that "the remedy to be applied is more speech, not enforced silence." 274 U.S. at 377; *see also Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (applying test for suppressing political speech set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

In case after case following *Virginia Bd. Of Pharmacy*, the Court has continued to stress the importance of the free dissemination of information about commercial choices in a market economy; the anti-paternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing "commercial" speech from speech necessary to democratic decision making; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly. *44 Liquormart Inc.*, 517 U.S. at 520 & n.2 (Thomas, J., concurring in judgment) (collecting cases). In this way, limits on commercial speech hinder not only consumer choice, but also the debate over central issues over public policy. *Id.* at 503.

At the same time, however, the Court's cases recognize that the state may protect the consumer by regulating commercial advertising more freely than other forms of protected speech. Thus, the state may require commercial messages to "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it from being deceptive," *Virginia*

Bd. of Pharmacy, 425 U.S. at 772 n.24, and may restrict some forms of aggressive sale practices that have the potential to exert undue influence over consumers, *Bates*, 433 U.S. at 366. Cases after *Virginia Bd. of Pharmacy* and *Bates* explained that the state's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked to inextricably to those transactions. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456-57 (1978) (stating that "in person solicitation by a lawyer over remunerative employment is a business transaction in which speech is an essential but subordinate component.") Nevertheless, as the Court explained in *Linmark*, the state retains less regulatory authority when its commercial speech restrictions strike at "the substance of the information communicated" rather than the "commercial aspect of [it] – with offerors communicating offers to offerees." 431 U.S. at 96; *Carey v. Population Services Int'l*, 431 U.S. at 701 n.28.

When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, it does so for reasons related to the preservation of a fair bargaining process. *44 Liquormart Inc.*, 517 U.S. at 501. It is the state's interest in protecting consumers from "commercial harms" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than non-commercial speech." *Id.* at 502 (quoting *Cincinnati v. Discovery Network Inc.*, 507 U.S. at 426). The state does not possess a similar interest in protecting its citizens from even false or misleading speech that is part of a broad public policy discussion rather than narrowly focused on a specific economic transaction:

> Transaction driven speech usually does not touch upon a subject of public debate, and thus misleading statements in that context

> are unlikely to engender the beneficial public discourse that flows from political controversy.... The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.

Rubin, 514 U.S. at 496 (Stevens, J., concurring).

When a state regulates commercial messages to protect consumers from misleading or deceptive sales practices, the purpose of its regulation must be consistent with the reasons for according less constitutional protection to commercial speech. *44 Liquormart*, 517 U.S. at 501. Conversely, when a state prohibits the dissemination of commercial messages for reasons unrelated to the elimination of an unfair bargaining practice, there is far less reason to depart from the rigorous review that the First Amendment generally demands. *Id.* In all other cases, speech is not placed beyond the outer limits of the First Amendment's broad protective umbrella merely because the statement may include the kind of alleged inaccuracy that, for better or worse, is commonplace in the robust public debate. *Bose Corp. v. Consumers Union*, 466 U.S. at 513. "[E]rroneous statement is inevitable in free debate, and...must be protected if the freedoms of expression are to have the 'breathing space they 'need....to survive.'" *Id.* (quoting *New York Times v. Sullivan*, 376 U.S. at 271-72). The challenged statements do not concern the price or safety of any Nike product, nor are they even alleged to provide any misleading information about the product's essential purpose or function. Absent these considerations,

there is no justification for treating Nike's statements as transaction driven speech.

The statements made in this case clearly address matters of public concern in which the commercial aspect is an essential – but subordinate – component. It makes no sense to provide that speech less than full constitutional protection because Nike, itself, is the subject of the speech. In *Connick*, 461 U.S. at 147-48, this Court held that the question of whether a government employee's speech involves a matter of public or private concern can be determined by examining the content, form, and context of the speech. These criteria are equally relevant here and, both individually and collectively, undermine the commercial speech label affixed to Nike's speech by the lower court. Nike's challenged communications were a part of a heated, nationwide discussion about the conditions under which Nike products are manufactured abroad and about whether Nike was acting responsibly in addressing those working conditions. For the most part, the discussion was carried out in the public media in which two opposing points of view were heard. Like contestants in a labor dispute, both sides have First Amendment rights when they express themselves in order to influence its outcome. *Virginia v. Bd. of Pharmacy*, 425 U.S. at 762-63 (discussing *Thornhill* and other cases). The debate, here, was precisely the sort of give and take, charge, response, and counter-charge that we typically think of as political discourse. In such situations, it is up to the court of public opinion, not a court of law, to choose sides. *See First National Board of Boston v. Bellotti*, 435 U.S. at 785-86, 791-92.

The California Supreme Court's reliance on *Bolger v. Young*, 463 U.S. 60 (1983), to justify its characterization of Nike's speech as commercial speech is flawed for several reasons. First, *Bolger* did not purport to adopt a general definition of commercial speech. To the contrary, the Court has candidly acknowledged that the line between

commercial and noncommercial speech rests more on "common sense," *Central Hudson*, 447 U.S. at 561, then on "precise boundaries." *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 637 (1985). Second, the facts of *Bolger* are readily distinguishable. Properly understood, *Bolger* is a case about pretext. The corporate speaker in that case manufactured Trojan brand condoms. It sent a mass mailing to the public discussing the use of contraceptives and the prevention of venereal diseases. The corporate communication was not issued in response to an ongoing debate about corporate practices. Rather, the Court concluded that it was a thinly veiled effort to market specific corporate products that were identified and promoted in its pamphlet.[2] Here, Nike's speech did not "simply…include[] references to public issues." *Bolger*, 463 U.S. at 68. On the contrary, Nike's products were the public issue. Third, even in *Bolger*, the Court noted that the mere fact that speech takes the form of an advertisement, or refers to a products, or is economically motivated, does not mean that it can or should be characterized as commercial speech. *Id.* at 66-67. And while the presence of all three factors in *Bolger* justified the commercial speech label, *id.* at 67, nothing in *Bolger* suggests this must always be so, especially if (as here) the political aspect of the speech predominates for both speaker and listener. Finally, both before and after *Bolger*, this Court has held that the commercial speech doctrine does not apply when political and commercial speech are inseparable because any other rule would fail to provide political speech with the breathing room it needs to survive. *See, e.g., Murdock v.*

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[2] *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 474-75 (1989) ("Including home economics discussion as part of "Tupperware" party does not convert commercial speech into educational speech any more than "opening sales presentations with a prayer or Pledge of Allegiance would convert them into religious or political speech").

Pennsylvania, 319 U.S. 105, 111 (1943); *Thomas v. Collins*, 323 U.S. 516, 534-36 (1945); *Riley,* 487 U.S. at 796.

In a participatory democracy, the First Amendment does not allow the government to substitute its judgment for the judgment of the people in evaluating conflicting arguments on matters of public concern. *Bellotti,* 435 U.S. at 791-92. The state is no more free here to interfere with that choice on the grounds that Nike's statements relate to and further its commercial interests than it could interfere with a consumer boycott targeting retail stores that engage in racial discrimination. *See Clairborne Hardware Co., supra.* The state's paternalistic instincts in this case are simply misplaced and have consistently been rejected by the Court in its commercial and corporate speech cases, let alone in cases involving core political speech that had a an essential but subordinate commercial aspect. *See Bellotti, supra; Consolidated Edison Co., supra; New York Times v. Sullivan, supra; Thornhill, supra.*

For example, in *Consolidated Edison Co.*, a public utility sought to promote nuclear power (and thereby its own economic interest) by including an insert with its monthly bill stating, among other things, that the benefits of nuclear power "far outweigh any potential risk" and that nuclear power plants are "safe, economical, and clean." 447 U.S. at 532. An environmental organization asked the Public Service Commission to require the public utility to include materials providing an opposing point of view on the issue. Instead, the Commission adopted a flat prohibition on the discussion of political issues in bill inserts, "including the desirability of future development of nuclear power." *Id.* The New York Court of Appeals upheld the ban against a First Amendment challenge and this Court reversed. The Court never once considered the possibility that the ban was merely a regulation of commercial speech, even though the public utility had an obvious stake in the debate. Rather, the Court held: "The Commission has limited the means by

which Consolidated Edison may participate in the public debate on this question and other controversial issues of national interest and importance. Thus, the Commission's prohibition of discussion of controversial issues strikes at the heart of the freedom to speak." *Id.* at 535.

The Supreme Court's decision in *Thornhill* presents a second compelling parallel. In *Thornhill*, the Supreme Court invalidated a ban on labor picketing. Although only economic interests were at stake, the Court was clear that this was the sort of communication that the First Amendment intended to protect:

> Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and the press, however, impairs those opportunities for public education that are essential to effective exercise of the power correcting error through the processes of popular government.

310 U.S. at 95. Indeed, the Court could have been writing about this very case when it said:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution...Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of

> popular government to shape the destiny of modern industrial society.

Id. at 102-03.

The constitutional error inherent in the lower court's treatment of Nike's communications as commercial speech, given the context of the public debate over Nike's practices and policies, is that it disqualifies Nike's speech from full First Amendment protection on the theory that Nike had an economic self-interest in the outcome of the debate. This Court has consistently rejected that approach. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti,* 435 U.S. at 777. *See also Virginia Bd. of Pharmacy*, 425 U.S. at 762-63 ("The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and employer are protected by the First Amendment when they express themselves on the merits of the dispute..."). *See also id.* at 762 (recognizing the right of pharmacists to speak on issues affecting the industry despite their economic interest in doing so.)

In *Bellotti,* the Supreme Court considered a Massachusetts statute that prohibited corporations from making campaign contributions in support or in opposition to a referendum unless the outcome would materially affect the property, business or assets of the corporation. The Court struck down the statute, rejecting the claim that corporations lack First Amendment rights. The Court noted that the critical issue was not whether corporations have First Amendment rights, but "whether [the statute] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776. The Court found the statute to be "an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues..." *Id.* at 784. It went on to note: "Especially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.* at 785-86 (footnote omitted).

In *Bellotti*, of course, the corporation was denied the right to speak on a matter of public importance because its interest in the issue was not considered "material." The lower court would impose just the opposite rule here. Plainly, Nike's economic interests were directly threatened by the ongoing consumer boycott of Nike products. However, a boycott was not the only possible result of the attacks on Nike. The public reports of human rights and labor organizations about the conditions under which Nike products were being produced were well-publicized in the national media. In addition, prominent columnists were calling for action to remedy abuses at the Asian workplaces where Nike products were manufactured. This widespread publicity could certainly influence public support for legislation or other forms of regulation at the state, national, or even international level. Such attempts to influence public opinion, with a view toward shaping governmental policies, is core political discourse. *Bellotti*, 435 U.S. at 777 n.12; *Thornhill*, 310 U.S. at 95; *cf. Riley,* 487 U.S. at 788 ("charitable solicitations 'involve a variety of speech interests....that are within the protection of the First Amendment,' and therefore have not been dealt with as 'purely commercial speech.'" (quoting *Village of Schaumburg v. Citzens for a Better Environment*, 444 U.S. 620, 632 (1980)); *In re Primus*, 436 U.S. 412 (1978) (client solicitation by public interest attorneys not the same as commercial offers of legal assistance from other attorneys because activities of public interest attorneys in soliciting clients intimately connected to the advancement of political beliefs and ideas).

The essential question in this case, simply put, is whether Nike's corporate status or economic interest in the subject matter deprives the proposed speech of what otherwise would be its clear entitlement to protection. *See Bellotti*, 435 U.S. at 778. The answer to that question must be no. As the *Bellotti* Court emphasized, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider making their judgment, the source and credibility of the advocate." *Id.* at 791-92 (footnote omitted).

Even to the extent that Nike's communications were intended to answer calls for a consumer boycott, its speech is not simply "commercial" speech any more than a consumer boycott could be considered simply "economic" action. Just as calls for a consumer boycott are protected concerted political action and speech, *NAACP v. Clairborne Hardware Co., supra*, so too are the answers to the charges.

This case not only typifies the circumstance where speech with a commercial aspect is subordinate to the non-commercial aspect, but also demonstrates the futility of attempting to separate the two. Nike's labor practices and policies, and in turn its products, are the public issue. In this respect, *Thomas v. Collins*, 323 U.S. 516, is perhaps most closely on point. In *Collins*, the Supreme Court was confronted with a Texas statute requiring labor organizers to register before soliciting workers to join a union. *Id.* at 522. Thomas, the national president of the United Auto Workers union, had come to Houston to address a mass union organizing meeting. *Id.* at 521. Texas authorities took the position that he was required to be licensed as a labor organizer. *Id.* n.3.

Although in his speech at the meeting Thomas specifically exhorted members of the audience to join the union, the Supreme Court nevertheless held that the statue

could not constitutionally be applied to him. *Id.* at 536-37. Rejecting the argument that Thomas' invitation to join the union was no more than a business transaction, *see* 323 U.S. at 556 (Roberts, J., dissenting), the Court concluded that, because it was impossible to separate his advocacy of unionism in general from a call to join the union, Thomas' right to speak could not be conditioned upon his obtaining an organizer's license. *Id.* at 534-36. "A speaker in such circumstances could avoid the words 'solicit,' 'invite,' 'join.' It would be impossible to avoid the idea." *Id.* at 534.

Justice Jackson, in his concurring opinion, recognized the authority of the state to protect the public from "those who seek for one purpose or another to obtain money." *Id.* at 545.

> But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us.

Id.

Thomas controls here. Implicit in any defense by Nike of its labor practices is the message that the charges against it should not deter someone from buying its products. As discussed above, however, that is not the only, or even the predominant, message of the communications at issue here. In these circumstances, the inevitable "commercial" subtext cannot convert communications that are, at core, elements of an ongoing public policy debate into commercial speech subject to government oversight and regulation. *See*

Riley, 487 U.S. at 796 ("we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech').

The danger to First Amendment values posed by respondent's suggestion that Nike's communications be treated as commercial speech can be better understood if we consider the consequences of doing so here. Taken together, the nine communication plaintiff challenges contain a wealth of information and argument. Here, respondent has picked out only six statements that claim to be false. Viewed in isolation, the claim that these statements must be tested for truthfulness may have some appeal. But once that claim is accepted, every sentence, every word in these documents becomes subject to challenge on the ground not only that it is false, but also that it is misleading. The choice of language, the use of example, the reasoning of each argument is thrown open to question. The conventional wisdom is that the chill of such scrutiny is not a concern in the realm of commercial speech. *See Bose Corp. v. Consumers Union*, 466 U.S. at 506 n.22. The *Bellotti* court, however, correctly pointed out the danger that exists when that rule is applied to public policy discourse:

> Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties – personal as well as corporate – provided for in [the statute]... [M]anagement never could be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue. In addition, the burden and expense of litigating the issue – especially when what must be established is a complex and amorphous economic

> relationship – would unduly impinge on the exercise of the constitutional right. "[T]he free dissemination of ideas [might] be the loser."

Bellotti, 435 U.S. at 785 n.21 (quoting *Smith v. California*, 361 U.S. 147, 151 (1959) (citations omitted)); *accord, New York Times v. Sullivan*, 376 U.S. at 279.

The discussion of public issues in this case lie at the heart of the principles that animate the First Amendment. The lower court was wrong to conclude that the discussion of these issues was being used merely as a subterfuge to avoid regulation as commercial speech.

CONCLUSION

For the reasons stated above, the judgment of the California Supreme Court should be reversed.

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Dated: February 24, 2003

FEB 28 2003

No. 02-575

In the

Supreme Court of the United States

October Term, 2002

NIKE, INC., ET AL.,
PETITIONERS

v.

MARC KASKY,
RESPONDENT

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

In support of Petitioners

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CONSENT TO FILE

Written consent to file in this matter was provided by all parties and is on file with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press against threats in many forms. The Center has participated actively in the litigation of First Amendment issues, and has filed *amicus curiae* briefs in the United States Supreme Court, the Federal Courts of Appeals, and in numerous state courts.

The Media Institute is an independent, nonprofit research organization. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, competition within the communications industry, and journalistic excellence.

NATURE OF CASE AND STATEMENT OF FACTS

The California Supreme Court ruled that the state's false advertising law may be invoked to enjoin corporate statements which explain a company's labor policies and practices to the general public. That result follows, declared a bare majority of the California court, from the source and context of the message, if a corporate speaker, "to promote and defend its sales and profits, makes factual representations about its own products or its own operations . . . ." *Kasky v. Nike, Inc.*, 45 P.3d 243, 247 (Cal. 2002).

The case arose when a California citizen invoked against a footwear manufacturer a state statute designed to curb false advertising and unfair competition. The plaintiff claimed that the company had made false statements in the course of explaining its labor policies and practices to the general public. Those statements had been issued in response to widespread criticism of the company's alleged exploitation of workers at certain offshore manufacturing sites. The complaint alleged that the corporate statements at issue contained false and misleading material;

consequently, the plaintiff urged that the statements were subject to, and in violation of, the California law regulating false advertising.

The Superior Court and the Court of Appeals rejected these claims, ruling that such explanatory corporate statements were non-commercial speech, and were accordingly not subject to the false advertising law. The California Supreme Court, however, reversed by a 4-3 margin, and concluded that these corporate statements should be deemed commercial speech because they had been issued by a business entity, were directed to a commercial audience, and related to the company's business operations in ways that might enhance the market for the company's products. Thus the statements were not , in the supreme court's view, entitled to the high degree of First Amendment protection that the lower courts had accorded them. Three justices dissented, citing what they believed to be serious departures from precedents both of their court and of this Court regarding the status of commercial speech. The defendant company promptly sought review by this Court of the substantial First Amendment issues raised by the California Supreme Court decision.

SUMMARY OF ARGUMENT

Under settled First Amendment principles which this Court has clearly and consistently announced, the corporate statements at issue lie well beyond the reach of injunctive or damage claims. Properly viewed as non-commercial speech, Nike's messages could clearly not be enjoined by any court. Nor could such statements give rise to civil liability in the absence of defamatory or otherwise actionable content, the presence of which has not been claimed here. To impose such liability would represent a basic affront to First Amendment principles.

The judgment of the California Supreme Court reflects several severely flawed premises, which blend to create a dangerous departure from this Court's settled principles of freedom of expression. First, the court below took a disparaging view of statements by a corporate speaker, effectively treating all communications by a business entity, designed in any degree to "promote and defend its sales and profits," as undeserving of full First Amendment protection. This Court has, for over a half century, recognized that neither a profit motive nor a corporate source in any

way disqualifies speech on matters of public importance from full constitutional protection.

Second, the ruling of the court below reflects a dangerously truncated interpretation and application of the doctrine of commercial speech; it presumes that statements which might enhance the appeal of commercial products (even though focused on the speaker's "operations" rather than on products per se) must for that reason be treated as "commercial speech" and thus receive substantially lesser First Amendment protection. To the contrary, many judgments of this Court recognize that not all statements which may pertain to a commercial product, or which may be of interest to consumers of that product, are properly classified as commercial speech and for that reason deprived of full constitutional protection.

Third, by effectively hobbling the corporate speaker in any debate over issues of public importance (such as a manufacturer's offshore labor policies), the California Supreme Court's ruling creates a degree of viewpoint discrimination that is incompatible with this Court's judgments in cases such as *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In effect, the non-corporate speaker's

claims and accusations receive full First Amendment protection, while the corporate speaker's response to those claims, addressing precisely the same issues in public debate, receives substantially lesser protection – a disparity that is clearly at variance with this Court's insistence on viewpoint neutrality.

Finally, the views expressed by the two lower state courts, and by the three dissenting justices in California's highest court, surely would not deprive California consumers of essential protection from false advertising or deceptive claims by corporate speakers. The commercial speech doctrine, properly applied to advertising as this Court has defined it, contains ample safeguards through which government may regulate misleading or exploitive statements by business entities, without compromising free expression in the marketplace as the ruling challenged here inevitably does. For these reasons, *amici curiae* respectfully urge the reversal of the judgment of the California Supreme Court as a dangerous departure from First Amendment principles.

ARGUMENT

I. NEITHER A PROFIT MOTIVE NOR A CORPORATE SOURCE WARRANTS LESSER FIRST AMENDMENT PROTECTION FOR THE SPEECH OF A BUSINESS ENTITY.

A central premise of the California Supreme Court's judgment is that "the marketplace of ideas" does not encompass the commercial marketplace. This Court first recognized the fallacy of that view more than a half century ago, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). In that case, New York State invoked this Court's judgment in *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U.S. 230 (1915), which did indeed deem a profit motive or commercial business activity as dilutive of a motion picture producer's or distributor's claim of First Amendment protection. But the *Burstyn* Court rejected that assumption once and for all, noting that the fact "[t]hat books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." 343 U.S. at 501. Indeed, the Court added that "we fail to see why operation for profit should have any different effect in the case of motion pictures." *Id.* at 502.

Later cases have consistently reinforced the principle that a profit motive or corporate status does not deprive a speaker of full constitutional protection. Thus, in *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978), this Court noted that "the inherent worth of the speech in terms of its capacity for informing the public did not depend upon the identity of its source, whether corporation, association, union or individual." In a similar vein, this Court several years later observed that "[c]orporations . . . contribute to the 'discussion, debate and dissemination of information and ideas' that the First Amendment seeks to foster." *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1, 8 (1986) (plurality opinion) (quoting *Bellotti*, 435 U.S. at 783). In other cases involving corporate challenges to government restrictions on expression, this Court has simply assumed, without needing to elaborate, that a profit motive or a business context would not disadvantage a speaker or warrant a lesser degree of First Amendment protection. *C.f. Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) ("In the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.")

Although they have seldom been fully articulated, sound policy considerations buttress this Court's consistent view that neither corporate status nor a profit motive forfeits the right to speak freely on matters of public concern. The most frequently invoked premises of First Amendment protection apply no less clearly when the speaker happens to be a business entity operating for private profit. The Jeffersonian belief that free expression is vital to informed participation in government by a responsible citizenry draws no distinction between or among the sources of information, some of which is likely to come from business entities, whatever may be the degree of their self interest. Constitutional scholar Alexander Meikeljohn's twentieth century reaffirmation of the essentiality of a well-informed citizenry as the rationale for free expression is similarly devoid of any distinction based upon the corporate status or the profit motive of the speaker. *See* Alexander Meikeljohn, Free Speech and Its Relation to Self-Government (Oxford University Press 1948).

Indeed, that view is wholly consistent with this Court's recognition, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 765 (1976), that "[i]t is a

matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed," and that the "free flow of commercial information" advances this goal. On any of the several rationales that justify substantial First Amendment protection for commercial speech, Professor Martin Redish and Howard Wasserman are clearly correct to insist that "the fact that a corporation's speech is directed toward the goal of economic gain should not distinguish it from other associational forms for First Amendment purposes." Martin H. Redish & Howard M. Wassermann, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 255 (1998).

It would be naïve, of course, to claim that a speaker's corporate status may never be germane to First Amendment analysis. There are at least two familiar contexts in which the source and the motive for a business entity's communication may bear upon the scope of permissible regulation. One such context is that of political contributions, where this Court has properly recognized that money paid by a corporation (or a labor union) may be regulated to a degree that is not appropriate for political contributions from individuals.

E.g., *FEC v. National Right to Work Committee*, 459 U.S. 197, 208-211 (1982). Yet the very specificity of such restraints, focused as they are upon the risk of corruption or the appearance of corruption that corporate contributions present, *see Bellotti*, 435 U.S. at 788-789, makes clear the untenability of a blanket disqualification of all corporate speakers even in the sensitive political-campaign arena. Such a narrow focus also offers reassurance that where corporate communications do pose a clear risk to valid regulatory interests, government is not powerless to intervene.

The other context in which a speaker's corporate status or profit motive may bear upon expressive interests is, of course, commercial advertising. Where a corporate message "does no more than propose a commercial transaction," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976), this Court has recognized that a lower standard of First Amendment protection is appropriate; for example, deceptive or misleading claims are not protected as they would be in non-advertising statements. *Id.* at 771-773. The central question – to which the next section of this brief is addressed – is the degree to which other messages in the commercial context may properly be denied full

First Amendment protection. For present purposes, however, the point is simply to illustrate another context in which the corporate status of the speaker, as well as the goal and context of the message, are not wholly irrelevant to defining the proper scope of First Amendment protection. Yet here, as with political contributions, the sharply limited nature of the exception reinforces the fallacy of any claim that corporate speakers or profit motives are categorically disabling.

II. THE COMMERCIAL SPEECH DOCTRINE SHOULD NOT LIMIT FIRST AMENDMENT PROTECTION FOR SUCH CORPORATE COMMUNICATIONS AS THOSE AT ISSUE IN THIS CASE

Contrary to the premise of the judgment below, not all corporate communication – indeed, not even all "advertising" – may be relegated to a second class status under the First Amendment. The history and evolution of the doctrine of commercial speech bear closely upon the central issue of this case – whether the California Supreme Court correctly classified Nike's corporate statements about its offshore labor policies as entitled only to diminished First Amendment protection. This Court's treatment of an analogous

issue in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) is highly instructive. At the time of that decision, advertising was wholly unprotected under *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Only Justice Douglas, in his concurrence in *Cammarano v. United States*, 358 U.S. 498 (1959), had suggested a contrary view. Yet, in *New York Times* Justice Brennan made clear that *Valentine* barred protection only for "purely commercial advertising" and in no way diminished protection for "the freedom of communicating information and disseminating opinion." 376 U.S. at 265-66. Thus, it was wholly irrelevant to First Amendment interests that the message which was the focus of Commissioner Sullivan's libel suit appeared under the "advertisement" rubric, had been paid for by the ad's sponsors, and was published in a for-profit medium. The statement in issue, said Justice Brennan in distinguishing *Chrestensen*, "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are of the highest public interest and concern." *Id.* at 266.

The emergence more than a decade later of the commercial speech doctrine in no way undermined the *New York Times*

distinction. Indeed, by focusing on speech which "does no more than propose a commercial transaction" as a now partially protected type of message, this Court in *Virginia Board of Pharmacy*, 425 U.S. at 762, implicitly preserved the rationale for treating more favorably that corporate-sponsored speech which is more closely akin to the *New York Times'* editorial advertisement. While this Court has declined several invitations to define more precisely the contours of "commercial speech," its decisions applying this doctrine have never relegated to the status of lesser protection any corporate communications of the type that have been targeted in the present case.

Especially instructive is Justice Marshall's majority opinion in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 61-75 (1983). That case dealt with mass mailings which unambiguously promoted specific contraceptive products to potential consumers, albeit accompanied by "informational pamphlets" which promoted contraceptives in general as well as the advertiser's own products. The *Youngs* Court did eventually conclude that such mailings were properly treated as "commercial speech," noting that "advertising which 'links a product to a current public debate' is not thereby

entitled to the constitutional protection afforded non-commercial speech." *Id.* at 68. Nonetheless, the majority raised important cautions about the classification process, warning against intuitive assumptions based on the content of corporate messages. For the *Youngs* court, "the mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. . . Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech." *Id.* at 66 (citing *New York Times*, 376 U.S. at 265-66). In its decision in this case, the California Supreme Court majority seized on the footnote clarification in *Youngs* that a generic reference to a *product* in advertisements "does not . . . remove it from the realm of commercial speech." *Id.* at 67, n.13. Ironically, this reference actually implies that *non-product* focused statements, such as the ones at issue here, should be exempt from commercial speech restrictions. Nothing in *Youngs'* other cited footnote alters that implication; Justice Marshall's caution that "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech" simply left that issue entirely open in a case where the promotional materials were

unmistakably product-specific. *Id.* at 68, n.14. Moreover, the undoubted "economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech." *Id.* at 67.

Although the commercial speech doctrine has experienced many ebbs and flows since *Youngs*, the basic concepts that were shaped two decades ago have proved remarkably durable. No corporate communications that were completely divorced from promotion of a specific product have been found by this Court to constitute "commercial speech." Although it is true that Justice Stevens, beginning with his *Youngs* concurrence, has urged a sharper delineation between commercial and non-commercial expression, *id.* at 80, (Stephens, J., concurring), other members of this Court have deemed that task unnecessary given the ease of classification in most of the later cases and an outcome almost invariably consistent with a narrow view of what constitutes "commercial speech." The present case, for the first time, compels an analysis of that issue and demarcation of the line between fully and partially protected corporate speech.

The circumstances of this case not only call for such a distinction, but also offer an admirable vehicle for its application. Nike, like any manufacturer of goods or services promoted to the consuming public, engages in a substantial amount of product-specific print and broadcast advertising which is unmistakably commercial speech. If and when such advertising contains false, deceptive or misleading claims, regulation is surely appropriate to a degree that would not be acceptable for non-commercial speech. Consumers who have suffered injury by reason of any false or deceptive advertising claims might well have legal recourse under the California statute invoked in this case or similar laws of other states. Even where advertising may seek to advance the popularity of casual footwear over more formal attire, the inevitable citation of specific Nike products would cause such messages to be properly classified as "commercial speech." No matter how subtle the "proposal of a commercial transaction" may be, such messages are advertising pure and simple and, therefore, enjoy only limited protection under the First Amendment.

Where Nike or any other manufacturer responds to widespread criticism of its personnel policies and practices, however, the

situation is starkly different. Even though a favorable corporate image may not be wholly irrelevant to the market for footwear, the company is no longer selling shoes. Rather, it is engaging in debate on an issue of public importance and interest, much like the paid advertisement in *New York Times* which, as Justice Brennan explained, "communicated information, expressed opinion, . . . [in the context of] matters of the highest public interest and concern," 376 U.S. at 266. In such circumstances, corporate communications, like the informational mailings in *Youngs* (albeit more directly tied to specific products than are Nike's messages) are not inevitably "commercial speech" simply because they may enhance the market for products the direct advertising of which would merit lesser protection.

The core rationale of the commercial speech doctrine reinforces such a distinction. As this Court made clear in *Virginia Pharmacy*, a basic premise of partial protection for advertising is to maintain the free flow of potentially valuable information to consumers. The Court recently reaffirmed in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996), that the central reason for protecting truthful advertising is "the public's interest in receiving accurate commercial

information." To the extent that a well informed consumerate requires that government not "seek to keep people in the dark," *id.* at 503, that very interest argues for the widest scope of protection for information bearing not only (or even primarily) on choices among products, but far more broadly on social and economic policy. To presume that messages on one side of a profoundly important public debate cannot be fully trusted simply because they come from a corporate source reflects the sort of unacceptable "paternalism" which this Court has repeatedly condemned in its commercial speech cases. *E.g., id.* at 497.

Moreover, to the extent that potentially false or misleading information may pose concerns in messages such as those now in issue, the normal operation of the marketplace of ideas would provide any needed correction or refutation in ways that may not be fully trustworthy in regard to specific product advertising. If Nike should misstate or falsify any facet of its offshore labor policy, there will be no shortage of corrective information; indeed, this is the very type of situation that Justice Brandeis envisioned three quarters of a century ago, in which "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of

education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The quest in such a debate should be for truth, a value best served by maximizing the range of views that may be offered and tested in the marketplace of ideas.

Indeed, even pure "commercial speech" that is neither false nor misleading is often subject to the corrective measures of the marketplace. Such was the case several years ago when, in response to public protest, Nike withdrew its infamous "chainsaw" television commercial in which a female Olympic athlete was able to out-sprint a chainsaw murderer by virtue of her Nike running shoes. *C.f.* Lisa D'Innocenzo, *What Were They Thinking?*, Strategy, August 26, 2002, at 7. For the foregoing reasons, the corporate communications challenged here should be treated as non-commercial speech. Neither their corporate sponsorship, nor their potential to enhance the public image of that sponsor in ways that might incidentally promote shoe sales, warrants so major a metamorphosis of the commercial speech doctrine.

III. TREATING SUCH CORPORATE COMUNICATIONS AS "COMMERCIAL SPEECH" IS UNACCEPTABLE VIEWPOINT DISCRIMINATION.

If corporate communications such as those at issue here are deemed to constitute "commercial speech," and on that basis receive only partial First Amendment protection, government would effectively be taking sides in a vital public debate of importance. While a critic of the company or its employment practices is entirely free to publish deceptive or misleading accusations (subject only to an unlikely libel suit), the corporate target is hobbled in its response to such criticism if it may invoke only the less protective scope of commercial speech. The effect of such a distinction would be precisely what Justice Stevens warned forcefully against in *Youngs*: "[The challenged postal regulation] excludes one advocate from a forum to which adversaries have unlimited access." 463 U.S. at 84.

When government fully protects statements critical of corporate policy while inhibiting responsive statements simply because they come from the other side, it takes sides in the debate and thereby embraces the type of viewpoint discrimination this Court condemned in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and later cases,

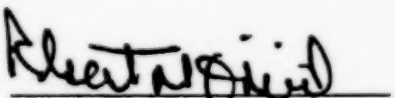
e.g., *Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995). As Professor Redish wisely observed, "A ban on corporate speech . . . does not equalize the debate but rather tilts the debate entirely in the other direction: the most effective contribution to one side of the public debate is effectively silenced." Redish & Wasserman, *supra* at 291.

Indeed, the inevitable effect of the challenged California Supreme Court ruling illustrates the hazards of allowing government to take sides in an important and timely public debate. Corporate explanations and extenuations may well be self-serving; indeed, only an imprudent, if not irrational, company would pass up an opportunity to enhance its corporate image in the process of issuing such public statements. But the presence of such presumed bias or self-interest hardly warrants relegating all corporate refutation or rebuttal to a lower level of First Amendment protection, as the ruling below does. The proper resolution is to treat such messages as non-commercial, if indeed they primarily convey information and opinion, and to treat as commercial speech only those messages that (in the words of the *Youngs* Court) "link . . . a product to a current public debate." 463 U.S. at 68.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the judgment of the court below and to remand the case for further proceedings consistent with this Court's settled principles of First Amendment protection for non-commercial expression.

Respectfully submitted,



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Supreme Court, U.S.
FILED
APR 3 2003
CLERK

No. 02-575

IN THE
Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari
to the California Supreme Court

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Although not included by Petitioner in its questions presented, this case presents a substantial jurisdictional question. That question is as follows:

> In this case, where there is no final judgment, does the Court have jurisdiction pursuant to the fourth exception in *Cox Broadcasting* to do any more than determine whether one or more of the statements alleged to be actionable in the complaint is not protected from suit under the First Amendment, as asserted by Petitioner?

Amicus believes the first question presented in the petition is more properly stated as follows:

> Does the First Amendment immunize a company from a lawsuit alleging that the company made specific false factual representations, as part of a campaign to persuade consumers that its labor practices were lawful and proper, merely because those practices are also the subject of public controversy?

Amicus believes that the proper answer to the jurisdictional question requires dismissal of Petitioner's second question presented.

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Jefferson v. City of Tarrant,
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Lorillard v. Reilly,
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New York Times Co. v. Sullivan,
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Ohralik v. Ohio State Bar Ass'n,
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MISCELLANEOUS

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M.M. Hossain, *Emerging Markets Database: The Debate on Labor Standards,*
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M. Scott, *Can Consumers Change Corporations?,*
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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a non-profit advocacy organization, with over 125,000 members nationwide and three offices, including one in California. Since its founding in 1971, Public Citizen has been active before Congress, regulatory agencies, and the courts in matters relating to consumer protection, among other things. Public Citizen has been in the vanguard in pressing for the extension of First Amendment protection to truthful commercial speech. For example, Public Citizen's attorneys represented the consumer plaintiffs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the first case to recognize that commercial speech is entitled to significant protection under the First Amendment. Amicus' counsel have also represented parties seeking to invalidate commercial speech restraints in other cases, including *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993), and Public Citizen has filed amicus briefs in numerous other cases before this Court involving commercial speech issues.

Although the interests of Public Citizen members and other consumers are served by truthful commercial speech, consumer interests are not served by marketing campaigns that seek to influence consumer choice through false or misleading statements. Such false marketing speech has no First Amendment value, and Public Citizen is concerned that the

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that no party had any role in writing this brief and that no one other than amicus or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

legitimate concerns that gave rise to the protection of commercial speech not become a cloak for marketing abuses.

Public Citizen submits this brief for two reasons. First, whereas Nike presents the challenged speech as a unified whole, without differentiating among the individual statements at issue, our brief highlights that at least some of the statements are specific, verifiable representations of fact intended to promote Nike's products to consumers as "labor friendly." These statements are indistinguishable from statements this Court has found to constitute commercial speech, and the Court should reaffirm that speech designed to induce consumers to purchase products may, if false or misleading, give rise to liability. Second, we file this brief to address the jurisdictional limitations of the Court's consideration of this case, an issue that Petitioner's merits brief does not discuss. Although the ultimate resolution of the First Amendment issues may not be the same for each statement, this Court should not attempt to resolve all of those issues at this time, for both jurisdictional and prudential reasons. Distinct from the other briefs in this case, our brief argues that the Court should make no further rulings in the case once it has identified at least one allegedly false commercial message that can serve as the basis for continuing this litigation in the California courts.

BACKGROUND

Petitioner Nike promotes its sports shoes, clothing, and equipment largely based on its brand identity. Its market success is thus closely tied to its corporate image. *See* First Am. Compl., Exh. A at 367 (Pet. Lodg. at 42) (1997 Annual Report) ("we are a company . . . that is based on a brand, one with a genuine and distinct personality, and tangible, emotional connections to consumers the world over").

In 1992, in the face of intense public criticism about conditions at its overseas factories, Nike initiated a public relations campaign to promote itself as labor-friendly. Nike adopted a "code of conduct" that it promised would guide its selection of and standards for the subcontractors who manufacture its shoes and apparel. *Id.* at ¶26, Exh. U. In addition, Nike adopted a monitoring system under which its subcontractors are required to sign a "Memorandum of Understanding" certifying that they are complying with a set of specific standards. *Id.*, Exh. V at 534-35 (Pet. Lodg. 206-07). Those standards include compliance with local minimum wage, overtime, health and safety, and other workplace laws, adherence to local environmental laws, and a promise not to use forced or child labor. *Id.*, Exh. V at 535 (Pet. Lodg. at 207). After adopting its code and monitoring system, Nike frequently issued public statements making factual claims about policies and practices affecting workers at its overseas factories. *See, e.g.*, *id.* at ¶28, Exhs. P, V, Z.

College athletic departments are among Nike's most important market constituents. In addition to being customers, more than 200 colleges and universities have promotional contracts with Nike under which they agree that their teams will use and endorse Nike products. *Id.* at ¶14. Accordingly, as part of its campaign to present itself as labor-friendly, Nike's Director of Sports Marketing sent a letter in June 1996 to the presidents and athletic directors of more than 200 colleges and universities. Among other things, the letter labeled "completely false" charges that "child labor is used in the production of [Nike] goods," and stated that Nike subcontractors comply with the labor requirements set forth in its Memorandum of Understanding "in all material respects." *Id.*, Exh. R.

In December 1996, as a further part of Nike's public relations campaign, Nike sent a letter to the *San Francisco Examiner* stating that Nike knows "consumers are savvy and want to know they support companies with good products and practices," and that "[d]uring the shopping season, we encourage shoppers to remember" that Nike is a leader in improving factory conditions. The letter went on to state that a recent study showed that Nike workers were able to devote 43 to 47 percent of their wages to savings or discretionary spending. *Id.*, Exh. S.

Another Nike document, entitled "Please, consider this . . .," *id.*, Exh. P, explained that "we'd like to share our perspective [about Nike labor practices] with you." Among other things, Nike stated: "No kids produce NIKE shoes and apparel," and "Nike pays on average, double the government-mandated minimum wage in the countries where our footwear is produced. "

In keeping with these efforts to promote itself as a labor-friendly company, in February 1997, Nike announced that it had commissioned former United Nations Ambassador Andrew Young and his organization Goodworks International to investigate and report on labor practices at Nike's overseas facilities. The Goodworks report concluded that Nike was generally doing a good job enforcing its code and improving workers' lives, *id.*, Exh. EE, and Nike took out full-page ads in five national newspapers quoting that conclusion. *Id.*, Exh. FF.

In 1998, respondent Marc Kasky sued Nike in state court. The complaint alleged that many of Nike's statements about its labor practices were false or misleading and sought relief under California Business and Professions Code section 17200 *et seq.*, which prohibits unfair competition, false

advertising, and consumer fraud and deception. Rather than answering the complaint, Nike demurred, asserting, among other things, that it would violate the First Amendment to apply section 17200 to *any* of Nike's statements about its labor practices. The superior court sustained Nike's demurrer on First Amendment grounds and dismissed the complaint with prejudice. Pet. App. at 80a. The court of appeal affirmed on the same ground. *Id.* at 66a. In so doing, it expressly declined to address any other issue. *Id.* at 66a, 70a. The California Supreme Court reversed in an opinion that addressed only Nike's First Amendment argument that none of its statements were actionable under section 17200, and it remanded the case for further proceedings. *Id.* at 1a.

SUMMARY OF ARGUMENT

The case before this Court properly presents one substantive question within the Court's jurisdiction: whether a company that makes specific, verifiable representations about its labor practices, as part of a campaign to promote its products to consumers as "labor-friendly," is protected from suit for false or misleading statements merely because the representations concern a matter of public controversy. The answer to that question is no.

Because this case was dismissed in the lower state courts (and then reinstated by the California Supreme Court) solely on the issue whether the First Amendment provides Nike a complete defense for every statement it made about its labor practices, the case lacks not only a final judgment, but also any record showing how California law would apply to the multitude of statements identified by Kasky. Going beyond the threshold question whether the First Amendment insulates Nike from liability to reach the numerous issues of statutory and

constitutional interpretation raised by Nike would violate the final judgment rule and involve the Court in deciding, without the benefit of a record, issues that were neither raised nor decided in the state courts below. Accordingly, once this Court determines whether any *single* factual representation by Nike may be subject to suit consistent with the First Amendment, it should remand the case to the California Supreme Court.

As to the sole question properly before the Court, this Court has long recognized that the First Amendment does not protect businesses from liability for false or misleading factual statements that are directed at consumers and relate to matters that affect consumer choices in the marketplace. Because Nike has made at least one specific, purely factual claim about its labor practices, and because that claim was made to consumers for the purpose of promoting Nike sales, Nike can be held accountable for that representation (if it is shown to be false or misleading) without running afoul of the First Amendment. As the Solicitor General acknowledges, the First Amendment would not be a defense if a government agency—federal or state—brought an action based on such statements. Likewise, it is not a defense in this private attorney general action.

Nike's promotional speech about its labor practices is commercial in the most important sense. Labor practices, as with other intangible aspects of products, are an established basis of consumer choice. To hold that companies have a First Amendment right to misrepresent facts about this subject to consumers, but not to misrepresent other matters that affect purchasing decisions, would be to infringe on consumer choice in exactly the way the First Amendment deems illegitimate.

The fact that a company's products or practices have become controversial does not transform factual representations

about those matters into non-promotional or political speech. This Court has long recognized that commercial speech receives intermediate protection because it is important to consumers. In that sense, all commercial speech involves matters of "public concern," to use Nike's phrase. Affording protection to false or misleading commercial speech would not only be unjustified under the First Amendment, it would undermine the very public interests that support protecting truthful commercial speech.

Accordingly, for the same reasons that other false or misleading commercial speech receives no First Amendment protection—and can be prohibited to the extent that it is both purely factual and false or misleading—Nike's factual representations to consumers about its labor practices are not immune from suit here. The Court should therefore affirm the decision below and remand the case for discovery and trial.

ARGUMENT

I. THIS COURT HAS JURISDICTION ONLY TO DECIDE WHETHER THE FIRST AMENDMENT ISSUE RAISED AND DECIDED BELOW DISPOSES OF THIS CASE.

Nike asserts that this Court has jurisdiction over this case under 28 U.S.C. § 1257(a), which confers jurisdiction over "final judgments or decrees rendered by the highest court of a State." Because no final judgment has been entered in the case, Nike has the burden of showing that some exception to the final judgment rule applies.

This Court has identified four categories of cases that constitute exceptions to section 1257(a)'s finality requirement. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). Nike relies on the fourth exception, Reply on Pet. for Cert. at 4, which has two requirements. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, *and* where reversal of the state court on the federal issue would be *preclusive* of any further litigation on the relevant cause of action." *Id.* at 482-83 (emphasis added). Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Id.*

1. Although the question is not free from doubt, we agree that the fourth exception is applicable to the first question presented to the extent that Nike can show that its First Amendment defense is dispositive of the entire case and that the failure of this Court to decide the issue now would seriously erode federal values underlying that defense.

Nike cannot make that showing, and in fact makes no effort to do so. As discussed in Point II below, some of the statements at issue are purely factual, readily subject to verification by Nike, fully capable of being proven true or false in a court of law, and integrally related to Nike's efforts to market its products. If the Court agrees that even *one* of those statements is actionable, the case will go forward. Because the fourth *Cox Broadcasting* exception applies only insofar as resolution of the issue would dispose of an entire cause of action, not just some aspects of it, the Court will lack jurisdiction at that point to further consider the issues raised in

Petitioner's brief. *Cf. Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995) (pendent appellate jurisdiction over non-final issues proper, if at all, only where such issues are "inextricably intertwined" with appealable issues).

Even if this Court has jurisdiction to address the applicability of the First Amendment to each factual assertion made in the complaint, it should exercise its discretion, as it would on a petition for a writ of certiorari, to decline to pass on the applicability of Nike's First Amendment defense with regard to each and every statement. Nike has never attempted to show that each statement alleged to be actionable is protected by the First Amendment. Rather, Nike has litigated this case on an all-or-nothing basis. This Court need not and should not take on the burden of sorting through the statements to determine which are actionable and which are not.[2]

The fact that this case is still in its state-court infancy further counsels against this Court ruling on each statement. Nike has not yet filed an answer, let alone participated in discovery or a trial, or obtained a decision from any California court as to whether any particular statement is true, false, misleading, or deceptive. Moreover, in many instances, the complaint alleges that Nike made a particular false or misleading statement without describing the context in which it was made. *See, e.g.* First Am. Compl. ¶28 (quoting Nike

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[2] Although this Court should not go through the allegedly false statements one by one to see which survive a First Amendment challenge on their face, the California courts can and should perform that task if this Court's discussion of the applicable legal standards differs from that of the California Supreme Court.

document entitled "The Nike Code of Conduct: What it is, How it Works"). Indeed, Nike's brief (at 26-27) makes much of Respondent's failure to consider the context of the speech. *See also* US Br. 27 (cautioning against addressing "commercial speech issue in this abstract context"). The obvious importance of context in deciding whether a given statement can give rise to liability provides an additional reason why the Court should halt its consideration as soon as it determines that at least one statement is actionable.

The Court's limited role in this case at this juncture does not mean that—in the course of explaining why the First Amendment does not bar all of Respondent's claims as to false or misleading statements that are specific, factual, and made to induce consumers to buy Nike products—the Court cannot contrast those statements with other statements that would, in all likelihood, not be actionable (for example, that Nike is a "moral company"). Thus, the Court can give additional guidance without attempting to resolve the constitutional viability of every allegation.

2. The second question presented by Petitioner poses even more troublesome jurisdictional problems. Most of Nike's discussion of the second question is directed to what it contends are unconstitutional burdens imposed by California law, including the use of what Nike terms "strict liability," the possibility that damages might be imposed for Nike conduct outside of California, the absence of a heightened standard of proof, and the possibility of court-imposed disgorgement of profits to an uninjured plaintiff.

This set of issues has two unifying features. First, with one exception, discussed *infra* at 12, none of the issues is dispositive of the case as a whole, although rulings in Nike's

favor might ease Nike's burdens on remand. For example, if the Court were to conclude that Kasky must show more than strict liability to prevail, that holding might make this case more difficult for him to win but would not end the litigation. Such issues do not fall within the fourth exception to *Cox Broadcasting*. And the fact that the first question presented arguably falls within a *Cox Broadcasting* exception does not affect the Court's jurisdiction over the second question. *See Pierce County v. Guillen*, 123 S. Ct. 720, 728-29 (2003) (where one portion of case fell within *Cox Broadcasting* exception and another portion did not, Court had jurisdiction only to decide former); *cf. Abney v. United States*, 431 U.S. 651, 662-63 (1977) (where one issue appealable under collateral order doctrine, other issues *not* immediately appealable unless they independently fall within exception to final judgment rule).

Second, Nike did not present any of these issues to the California Supreme Court, and that court passed on none of them. As stated in Nike's merits brief in this Court (at 14), the only issue before the California Supreme Court was whether Nike's false statements about working conditions at its own facilities meet the test for commercial speech. That issue is Nike's first question in this Court. Rule 14.1(i) of the Rules of this Court makes clear that when a case comes from a state court, the petitioner must show that the "federal questions sought to be reviewed were raised" below and how they were "passed on." Nike has made no such showing here because Nike did *not* raise the issues contained in the second question in the court below and the issues were *not* considered by that court.[3] *See* Pet. App. at 1a, *see also id.* at 66a, 70a. Therefore,

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[3] That some of these issues were noted in passing by the (continued...)

even if the final judgment rule were not a barrier to the Court's review of these objections, Nike's failure to raise them below precludes their consideration now.

The only potentially case-dispositive issue presented as part of Nike's second question is the argument that the First Amendment does not permit a "private attorney general" action unless it is brought by a plaintiff claiming personally to have suffered harm. Although this issue arguably would satisfy the fourth *Cox Broadcasting* exception, it is not before the Court because it was not raised or decided below. *See* Rule 14.1(i). Furthermore, Nike is asking this Court to declare a state statute to be unconstitutional, at least on an as-applied basis, with no factual record and no opportunity by the state courts to consider the issue. In fact, the California Supreme Court's recent decision in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), indicates that California law does not permit disgorgement of profits as a remedy to a plaintiff who suffered no injury. Even if the Court has jurisdiction to consider the issue, it should exercise its discretion to decline to do so in the absence of a full record and meaningful consideration by the California courts.[4]

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[3](...continued)
dissent satisfies neither the requirement that the petitioner have presented them below nor the requirement that the court below have decided the issue. *See* R. Stern, *et al.*, *Supreme Court Practice* § 3.19 at 186 (8th ed. 2002).

[4] Moreover, the issue is not independently worthy of review, especially in the context of this case. Even if Nike and the Solicitor General were correct that a proper plaintiff in this case must allege that he purchased a Nike product and show (continued...)

Therefore, this Court has jurisdiction to decide, and in any event should decide, *only* whether there is at least one allegedly actionable statement that is not barred by Nike's First Amendment defense. As discussed below, several statements readily meet that standard. The remaining issues, "still sub judice in [California], [were] brought to this Court too soon." *Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997). Accordingly, the case should be remanded to the California courts to decide the remaining issues presented in this case.

II. NIKE MAY BE SUED FOR FALSE OR MISLEADING FACTUAL REPRESENTATIONS DIRECTED AT CONSUMERS ABOUT ITS LABOR PRACTICES.

Nike has made a number of specific, purely factual assertions to its customers about its labor practices. At this stage in the litigation, the Court must accept as true Kasky's allegation that these factual statements were false. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). Thus, Nike is claiming a right to disseminate false information to consumers about its manufacturing practices. Nike's argument is flatly at odds with the consumer and public interests that form the basis of the protection afforded *truthful* commercial speech. The First Amendment has never afforded the protection that Nike seeks.

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[4](...continued)
detrimental reliance on Nike's false statements, this litigation would not end. Kasky's counsel could amend the complaint to add such an allegation or to add one of the thousands of California consumers who could make such a claim.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, this Court recognized that truthful commercial speech is entitled to constitutional protection because it permits consumers to serve their own self-interests, which may be more important to them than "the day's most urgent political debate." 425 U.S. 748, 763 (1976). The Court also noted the public interest in consumers' decisions being "intelligent and well informed." *Id.* at 765. False information only frustrates these two constitutionally protected interests. As the Court has explained: "The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (citation omitted). Only regulation of truthful information presents the possibility that the state is imposing paternalistic goals on consumers and seeking to manipulate consumer choice by keeping information from them. *See Bates v. State Bar of Fla.*, 433 U.S. 350, 375 (1977); *Virginia State Bd. of Pharmacy*, 425 U.S. at 769-70; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996). Prohibiting false or misleading speech by businesses promotes informed consumer choice and ensures that consumers are not "kept in ignorance"—to borrow a phrase from *Virginia State Board of Pharmacy*, 425 U.S. at 769—by commercial speech itself.

Because the speech at issue is presumptively false, the inquiry performed in most commercial speech cases—whether the state regulation at issue is justified *despite* the barriers it creates to consumers receiving truthful information—is inapplicable here. Thus, if the California Attorney General had brought this case, surely the First Amendment would not shield Nike from liability for any factual representations that were

proven false. The same outcome follows here. The State of California, by prohibiting false or misleading commercial speech that *misinforms* consumers, seeks to serve the very interests identified in *Virginia State Board of Pharmacy* as worthy of constitutional protection.

A. Respondent's Suit Targets Specific Factual Assertions Directed at Consumers.

1. At least some of the speech identified in the complaint falls well outside the scope of Nike's First Amendment defense. This speech was marked by the indicia to which the Court has always looked in judging whether speech is commercial: It was directed to Nike customers, contained a promotional message, and was aimed at persuading consumers to buy its products. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983). Moreover, Nike's statements contained a number of specific factual claims about its labor practices that were readily verifiable by Nike and are fully capable of being proven true or false.

One example is the December 1996 letter from Nike's Director of Sports *Marketing* to presidents and athletic directors of more than 200 colleges and universities. *Id.*, Exh. R. Nike maintains endorsement contracts with more than 200 colleges that agree to use—and thereby promote—Nike products. *Id.* at ¶14. Sports endorsement contracts are so important that they are the only marketing activity singled out for specific mention in Nike's annual reports year after year. *See* Nike, Inc., Annual Reports for the years 1997-2002, at Year in Review, available at www.nikebiz.com.

In the letter to the college and university officials, Nike made several specific claims about how its products are made

to support its broader assertion that working conditions at its overseas factories meet established, identifiable standards:

> First and foremost, wherever NIKE operates around the globe, it is guided by principles set forth in a code of conduct that binds its product subcontractors . . . [and] strictly prohibits child labor, and certifies compliance with applicable government regulations regarding minimum wage and overtime, as well as occupational health and safety, environmental regulations, worker insurance and equal opportunity provisions. . . .
>
> . . . [S]ome violations occur. However, we have been proud that *in all material respects the code of conduct is complied with.*

First Am. Compl., Exh. R (emphasis added).

The context in which these factual representations were made—a letter from Nike's marketing department to important Nike customers—indicates that Nike's purpose was to promote itself to customers, to persuade them to use Nike products. The recipients of the letter were not prominent figures in the debate about overseas labor practices. Rather, they were prominent Nike customers and an important component in Nike's promotional strategy. And Nike's Marketing Director was speaking to them as part of the company's effort to maintain and boost sales.

The complaint also cites a release entitled "Please, consider this. . . ." *Id.*, Exh. P. Although the complaint does not explain how Nike used this document, the title and language (*e.g.*, "we'd like to share our perspective with you")

show that it was intended for consumers. Among other things, the document states: "Nike pays on average, double the government-mandated minimum wage in the countries where our footwear is produced." A document making specific factual assertions for consumers to "consider" is necessarily intended to promote a commercial transaction.

Either of the above examples of allegedly false or misleading speech is enough to maintain this suit. Other allegedly false statements may be actionable as well, although they are harder to assess at this early stage in the litigation because Nike's use of the material and its intended audience is not apparent from the face of the complaint. *See, e.g., id.*, Exh. V at 549 (Pet. Lodg. at 220) (document entitled "Nike Production Primer," representing that average line-worker's wage in Nike's Indonesia factory was double government-mandated minimum, that workers in Nike factories receive subsidies for food and health care, and that they receive overtime pay and paid leave).

These publications were prepared by Nike as part of a carefully-planned, sustained campaign to appeal to customers concerned about Nike's overseas labor practices. At this threshold stage, the Court could reasonably infer (and later discovery may confirm) that they were prepared by Nike's marketing department and released and promoted by its press office in an effort to communicate directly with consumers. That is, Nike was not speaking merely to participate in a debate about fair labor practices around the world or the value of various worker benefits. It was speaking to promote and protect its corporate image, an image that has long been at the crux of its marketing campaign and its sales success. *See, e.g.*, Nike, Inc., 2002 Annual Report, Year in Review, available at

www.nikebiz.com ("In communicating with consumers, we focused on emotional expressions of the Nike personality.").

Nonetheless, the most appropriate course given the posture of this case is for the Court not to sort through these other statements. If the Court agrees that the letter from a Nike marketing director to college and university officials or the Nike release asking consumers to "consider this" is not subject to Nike's First Amendment defense, its jurisdiction is at an end.

2. The fact that Nike's product marketing strategy is focused on image marketing, rather than traditional product sales pitches, is of no constitutional significance. To be sure, many of the Court's commercial speech cases have involved statements about price, as in *Virginia State Board of Pharmacy*, or ingredients, as in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), or direct solicitation of clients, as in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), or *Edenfield v. Fane*, 507 U.S. 761 (1993). Nike, however, has consistently chosen not to focus its advertising on such features of its products but instead to focus on creating and maintaining a strong brand identity, which revolves around a swoosh and an image. Commercials showing Tiger Woods bouncing a ball on the end of a golf club, Pete Sampras stretching for a ball on the tennis court, or sweating athletes pushing themselves to "Just do it"—all are efforts to promote sales by associating Nike with an image that will attract consumers. These ads say nothing about price and nothing about the materials used to manufacture products; they make no direct pitch that the viewer buy Nike golf balls, shoes, or shirts. Rather, they ask consumers to buy into the Nike image in the hope that they will then buy Nike products. In Nike's words, "We are here to inspire and motivate the athlete in all of us and advocate the love of sports." First Am. Compl., Exh. A at 372 (Pet. Lodg. at 47).

Presumably, not even Nike would argue that its image advertising was protected by the First Amendment if, for example, the Federal Trade Commission could show that the golf equipment used in a Tiger Woods commercial was not Nike's. Yet its "labor friendly" campaign is not meaningfully distinguishable. Its value to Nike is its ability to entice consumers seeking labor-friendly products to purchase Nike apparel and equipment and to forestall and negate criticism that might threaten sales. Any suggestion that Nike touted its labor practices in full page advertisements in national newspapers (*id.*, Exh. FF) only because it wanted to participate in a debate about proper working conditions in Asia is disingenuous at best and subject to being proven or disproven at trial.

B. The First Amendment Does Not Protect False Marketing Statements Simply Because They Relate To Controversial Topics.

No one, least of all Nike, contends that labor practices do not affect consumer choice. *See Sourcing: Cheap v. Ethical*, J. Am. Chamber Com. in Hong Kong, Sept. 1, 1997 ("American consumers have shown that they are prepared to pay a few dollars more for garments made in decent working conditions. Companies are realizing that it costs less to implement a code of conduct than to regain consumer loyalty lost by bad publicity."). A study by Marymount University revealed that 78 percent of consumers would avoid stores that sell clothing made under "sweatshop" conditions, and 84 percent would pay five percent more for clothing the manufacturer guaranteed was not made under such conditions. K. Cottril, *Global Codes of Conduct*, J. Bus. Strategy, May 1, 1996; *see also* US Br. 28 ("In today's environment, the means used to produce goods, no less than the quality of the goods themselves, have profound significance for some consumers, who are willing to pay more

to achieve desirable environmental or social ends."). And a plethora of business publications warn apparel retailers that a positive image regarding labor practices is essential for maintaining customer loyalty and market share. M.M. Hossain, *Emerging Markets Database: The Debate on Labor Standards,* The Independent, April 2, 2000; M. Scott, *Can Consumers Change Corporations*?, Executive Female, May 15, 1996; *Sourcing:Cheap v. Ethical*, *supra*; N. Morris, *Saving The Brand Name*, MacClean's, Dec. 11, 1995, at 30. Thus, Nike has a market-driven, economic incentive to promote itself as labor-friendly.

Nike's own statements demonstrate that Nike was speaking for the purpose of influencing consumer purchasing decisions. For example, Nike's December 1996 letter in the *San Francisco Examiner* spoke directly to "shoppers." Nike stated that "consumers are savvy and want to know they support companies with good products and practices." It also stated that "during the shopping season, we encourage shoppers to remember" that Nike is a leader in improving factory conditions and to "consider" that Nike established the sports apparel industry's first code of conduct "to ensure our workers know and can exercise their rights." First Am. Compl., Exh. S.

That the subject of Nike's speech related to a matter of public interest—the issue of what conditions should apply to contracts for overseas production by American companies —does not affect the First Amendment analysis. Nike was speaking in the hope of inducing consumers to buy its products. The First Amendment presents no barrier to actions based on false factual statements in this context.

1. A connection to an issue of public interest does not make otherwise commercial speech noncommercial and, a

fortiori, does not immunize false speech from scrutiny. *Bolger*, 463 U.S. at 68 ("We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech."); *see Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989). For example, the commercial speech at issue in *Central Hudson* was made by a utility, about electricity regulation, during and because of a national debate on energy conservation. 447 U.S. at 561. Likewise, many of this Court's most important commercial speech cases have involved speech about controversial products or services. *See, e.g., Lorillard v. Reilly*, 533 U.S. 525 (2001) (cigarettes); *44 Liquormart*, 517 U.S. at 489 (alcohol); *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) (gambling); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629-30 (1985) (legal representation in drunk driving cases and in product liability suits regarding Dalkon Shield); *Bolger*, 463 U.S. at 62 (contraceptives); *see also Virginia State Bd. of Pharmacy*, 425 U.S. at 764 (characterizing as "entirely 'commercial'" speech promoting artificial fur as alternative to extinction of fur-bearing animals and ad touting domestically produced product as preserving American jobs).

Thus, Nike's plea that the First Amendment protects its false statements because they addressed a matter of public concern runs counter to the foundations of this Court's commercial speech jurisprudence. Nike fails to appreciate that the protection afforded *accurate* commercial speech is based in part on the importance of that speech to the public. *Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65. For this reason, the Court has rejected the notion that a "line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id.* at 765; *see also Bates*, 433 U.S. at 364 ("Advertising, though entirely commercial,

may often carry information of import to significant issues of the day."). Public concern about Nike's labor practices neither distinguishes this case from prior commercial speech cases nor justifies immunizing Nike's allegedly false marketing representations from judicial scrutiny.

In addition, to give full First Amendment protection to Nike's marketing speech merely because it appeals to consumers based on social or political preferences would require the Court to engage in difficult and unjustified line-drawing concerning a vast array of consumer choices. Many product characteristics that do not directly affect consumers are accepted bases for marketing and purchasing products. For example, federal law requires that products bearing the label "Made in USA" must in fact have been made in the United States. 62 Fed. Reg. 63756, 63767-71 (1997) (FTC policy under authority of 15 U.S.C. § 45). Consumers look for such labels based in part on a belief that U.S.-made products will be produced in compliance with labor-friendly wage, labor, or health and safety laws. Surely, consumer purchasing choices influenced by this label are no different from consumer choices influenced by whether a product is made according to the production characteristics touted in Nike's statements.

Similarly, a consumer's choice when buying an automobile may be influenced by concern about the environmental effect of vehicle emissions—for example, some people pay more for hybrid cars because they produce fewer emissions. Under Nike's theory, however, public debate over whether vehicle emissions increase global warming would warrant extending First Amendment protection to an auto manufacturer's false marketing claims about reduced emissions from its vehicles. Other examples of product claims regarding characteristics that do not bear directly on tangible product

characteristics, but unquestionably affect purchasing decisions, include "dolphin-free" tuna (tuna caught using nets that do not harm dolphins), "green" labels indicating products produced in ways that meet certain environmental standards, products bearing a "union label," and representations that products were not tested on animals.

The terms "public issue" and "controversy" have little meaning as tests for distinguishing between commercial and noncommercial speech because so much of what corporations do is the subject of public interest or debate. Accordingly, fully protecting speech about any business practice that became a subject of public concern would mean that the more controversial or potentially hazardous a company's products or practices (*e.g.*, cigarettes, pharmaceuticals), the greater license the company would have to make misrepresentations to the public. The Court should not countenance a theory under which the aspects of products or business about which consumers care most become those about which they are least entitled to receive accurate information.

2. There is no principled basis under the First Amendment for distinguishing regulation through private attorney general suits from regulation through actions brought by state attorneys general or other government agencies. Therefore, granting full First Amendment protection to speech that is related to controversy would sharply curtail the government's traditional police power to regulate business conduct. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (state may regulate conduct carried out by means of speech).

For example, to protect the public's investments, the Securities and Exchange Commission regulates speech by requiring and forbidding various corporate disclosures.

Suppose a company negligently misreported its earnings, based on accounting methods that were the subject of public controversy. Under Nike's theory, the company would be entitled to claim a First Amendment defense to a shareholder action.

To protect the health of consumers, the Food and Drug Administration regulates much of what drug companies say about their pharmaceutical products. Suppose a pharmaceutical company, in the debate over the efficacy of a certain cancer treatment, made representations about its cancer drug that were not supported by the scientific evidence. Under Nike's theory, the FDA might well be foreclosed from regulating such speech.

And as the Solicitor General points out, the government's regulatory power to enjoin fraud under the Federal Trade Commission Act, as well as under the numerous state laws modeled after the FTC Act, runs counter to Nike's theory in this case. US Br. 28.

Each of these regulatory agencies acts in areas of significant public interest. Invalidating such regulation would drastically limit the traditional sphere of government police power and open consumers to the misconduct that the police power is meant to prevent. For this reason, if the question presented here arose in an action by a governmental agency, the Solicitor General would undoubtedly support the respondent. *See* US Br. 20.

3. Finally, allowing this suit to go forward would not place companies at an impermissible disadvantage relative to their customers. When a member of the public or a competitor makes a false statement about Nike's practices, Nike can hold the speaker accountable, consistent with state libel laws and the First Amendment. Morever, to the extent that Nike believed

that this suit was brought to chill the exercise of its right to speak with regard to a matter of public concern and was without legal merit, Nike could have moved, within 60 days of service of the complaint, to strike the complaint under California's anti-SLAPP statute. *See* Cal. Code Civ. Proc. § 425.16. If successful, Nike would have been entitled to recover from Kasky its attorney fees and costs incurred in making the motion. *Id.* § 425.16(c).

Suits like this one brought under California Business and Professions Code § 17200 make the playing field more level, by holding Nike accountable for its false speech. Such a result is particularly appropriate because Nike has an inherent advantage, as it can claim (and has claimed) first-hand access to facts about its 800 overseas factories that its critics can never attain. Assuming that the *New York Times v. Sullivan* standard does not apply in this lawsuit, *see* 376 U.S. 254, 279-80 (1964), less stringent speech protection would be justified by the fact that Nike's speech has a commercial purpose, is robust, and is verifiable by Nike. Because Nike's speech was intended to influence sales of its products, the First Amendment presents no impediment to holding Nike responsible for the accuracy of its factual assertions.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the California Supreme Court and remand the case for further proceedings.

Respectfully submitted,

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April 2003

APR -4 2003

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF AMICUS CURIAE THE CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

This brief is respectfully submitted on behalf of **Consumer Attorneys of California**.[1] **Consumer Attorneys of California** is a voluntary membership organization of approximately 3,000 consumer attorneys practicing throughout California. The organization was founded in 1962 and its members frequently utilize California's Unfair Competition Law (the "UCL," California Business & Professions Code §§ 17200, *et seq.*) to address consumer fraud practices. **Consumer Attorneys of California** has taken a leading role in advancing and protecting the rights of consumers in both the courts and the Legislature and is vitally interested in assuring the continuing ability to address false and misleading statements disseminated by businesses in the state and in assuring that the UCL remains a strong and effective means of addressing false advertising.

SUMMARY OF ARGUMENT

In their briefs, both Petitioner Nike, Inc. and the United States as Amicus Curiae assert that the First Amendment's protections cannot be effectively realized where a private party brings an action under California Business & Professions Code §§ 17200, *et seq.* (generally referred to as the Unfair Competition Law, or the "UCL"). (*See* Nike's Brief for the Petitioners, pp. 37-49 and brief of the United States.)

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1. Petitioner and Respondents have filed a blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

These arguments, however, misconstrue the meaning, effect and power of the UCL. After first admitting that the government has the power to regulate false, deceptive or misleading speech, the Solicitor General then goes on to assert that the First Amendment does not, however, "allow States to create legal regimes in which a private party who has suffered no actual injury may seek redress on behalf of the public for a company's allegedly false and misleading statements." (Brief of the United States, p. 8.) Further, the Solicitor General argues, the requirement that in "private causes of action" actual, personal harm must be demonstrated by the plaintiff is necessary to "ensure that any restriction on speech is justified." (Brief of the United States p. 8.)

But this argument is predicated on several major false assumptions. The first is that the cause of action alleged is a "private cause of action" brought by a "private party." Under the statutory scheme embodied in California's UCL, that is simply not the case. Rather, the action is a representative action brought ***on behalf of the general public***. (California Business & Professions Code § 17204; *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 126, 137 and 138 (n.18), 96 Cal. Rptr. 2d 485, 999 P.2d 718 (2000).) It is not a private action, by a private party, it is a public civil enforcement action brought by a public representative. That public representative, under the California statute, may be the Attorney General, a district attorney or a city attorney. (California Business & Professions Code § 17204.) The public representative may also be an individual or entity. (*Id.*) But whoever the representative is, they are not prosecuting a private action, but a public action.

The second false assumption embedded in the Solicitor General's arguments is that the courts will necessarily litigate

UCL actions differently, depending on the representative. The Solicitor General apparently has no complaint with a governmental agency or officer bringing a UCL action – as evidenced by its own support of actions under the essentially-identical FTC Act. But the Solicitor General apparently believes that when an individual brings exactly the same case under exactly the same allegations of fact, and based on exactly the same evidence, there will be different and lesser due process, First Amendment and other protections for the defendant than if a government actor is bringing the case. There is, however, neither logical justification nor empirical evidence to support that conclusion.

The Solicitor General's third false assumption is that because the individual plaintiff has not alleged direct harm to himself, no harm has occurred. The Solicitor General demands that not only must a UCL plaintiff allege that the statements are false, but that the plaintiff personally relied on them and suffered a personal injury – even though there is no requirement under the Solicitor General's analysis that a government actor be required to make those same allegations in the same context. Moreover, the Solicitor General's predicate completely fails to take into the account the underlying purpose and effect of California's UCL, i.e., to protect both competitors and the general public from the harm that necessarily and inherently occurs when a business – any business – makes misleading and deceptive statements. Indeed, the Unites States's position would return us to the long-abandoned days of *caveat emptor*, "let the buyer beware," and would dispose of and dispense with decades of consumer-interest legislation.

The Solicitor General's arguments also ignore the fact that while the UCL's sweep and standing provisions are

broad, its remedies provision is very shallow. In fact, all that is available under the UCL are equitable remedies, i.e., injunction and – in the absence of a certified class action – a very limited form of restitution. (California Business & Professions Code § 17203; *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527; *ABC Internat. Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal. 4th 1247, 1268, 61 Cal. Rptr. 2d 112, 931 P.2d 290 (1997).) Damages are not recoverable at all. (*Chern v. Bank of America*, 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310 (1976).) Because of these limited remedy provisions, the Solicitor General's personal harm proposal is utterly unnecessary to protect either speech or speakers.

Finally, the Solicitor General's arguments also overlook the simple reality that whether brought by a private party who suffered individual harm or whether brought by a private attorney general, no regulation occurs and no remedies – however limited – are imposed, unless it is proven that, in fact, the speech is false, deceptive or misleading. Either way, the same due process and procedural protections remain in place: Legal power is limited to regulating only false, deceptive or misleading speech – which even the Solicitor General, under this Court's prior rulings, must concede is appropriate.

Thus, the entire foundation for these arguments is built on unjustified assumptions, insupportable presumptions and indefensible supposition. As such, these arguments should be disregarded and this Court's analysis should be focused on the real – and very narrow – issue presented in this case: Whether – as specifically and explicitly alleged in

this action – a commercial business's false and misleading statements about its own operations which were made ***for the purpose of promoting its own products*** constitutes commercial speech.

ARGUMENT

I.

SINCE EVERY VIOLATION OF CALIFORNIA'S UCL CAUSES INHERENT HARM TO COMPETITORS OR THE PUBLIC, FIRST AMENDMENT PROTECTIONS ARE NOT IMPROPERLY ABROGATED OR LIMITED IN A UCL ACTION BROUGHT BY A PRIVATE ATTORNEY GENERAL

The Solicitor General's arguments are predicated on its erroneous presumption that, absent proof of harm by a private plaintiff, the First Amendment precludes regulation of even false and misleading commercial speech. (Brief of the United States, p. 10.) But that argument ignores the reality that harm is inherent in an action brought under California's UCL.

Over six decades ago, the California Legislature established – first under Civil Code section 3389, which was later re-enacted as Business & Professions Code section 17200, et seq. – a public right of action, enforceable in equity, to enjoin unfair business competition. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 567, 71 Cal. Rptr. 2d 731, 740 (1998).) Indeed, the UCL was patterned after the United States's own, similar FTC Act. (*Rubin v. Green*, 4 Cal. 4th 1187, 1200, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993).)

But the fact that the action is directed toward unfair business ***competition*** does not restrict its application only to situations in which business competitors are harmed. Indeed, the goal of the act is much broader and is intended to address the general societal harm that results when business enterprises act illegally or unethically. As noted by the California Supreme Court in *People ex re. Mosk v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 770, 20 Cal. Rptr. 516, 520 (1962):

> Historically, the law of unfair competition and of trademark infringement evolved in the general field of torts. [Fn. Omitted] It was concerned primarily with wrongful conduct in commercial enterprises that resulted in business loss to another, ordinarily by the use of unfair means in drawing away customers from a competitor. With passage of time and accompanying epochal changes in industrial and economic conditions, the legal concept of unfair competition [fn omitted] broadened appreciably. This was occasioned, according to the Restatement, partly by the flexibility and breadth of relief afforded by equity, and partly by changing methods of business and changing standards of commercial morality. "**[T]he tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade. *The tendency still persists*.**"

(Bold added, italics added by *Mosk* court.)

And as more recently noted by the California Supreme Court in *Bank of the West v. Superior Court (Industrial Indemnity Co.)*, 2 Cal. 4th 1254, 1264, 10 Cal. Rptr. 2d 538, 544 (1992):

> The primary purpose of these statutes was to "extend[ ] ***to the entire consuming public*** the protection once afforded only to business competitors." (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 109, 101 Cal. Rptr. 745, 496 P.2d 817, interpreting Civ. Code, former § 3369.)

(Emphasis added.)

The Solicitor General's argument in this case essentially stands for the proposition that false, deceptive and misleading commercial speech does not, in and of itself, cause any "harm," and is therefore not actionable unless it causes pecuniary damage to an identifiable person. That position is naive. Indeed, as the California Supreme Court has said, "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (*Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 94 Cal. Rptr. 796, 484 P.2d 964, 968 (1971); *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 451, 153 Cal. Rptr. 28, 591 P.2d 51 (1979).) As the court went on to note in *Fletcher*, "our concern with thwarting unfair trade practices has been such that we have consistently condemned not only those alleged unfair practices which have in fact deceived the victims, but also those which are likely to deceive them." (*Id.*)

As one commentator has noted, "if truthful informative advertising is an unequivocal social good, false advertising is unequivocally bad. In the short run, deceptive advertising injures consumers and competitors. In the long run, false advertising results in a reduction of product quality and a misallocation of resources. If left unchecked, deceptive advertising may eventually undermine the entire competitive system." (Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 Fla. L. Rev. 487, 492 (July, 1993).) Indeed, in direct conflict with the underlying predicate for the Solicitor General's argument here that, in the absence of a direct harm to an individual plaintiff, there is no need or ability to regulate false advertising, the same commentator notes that "even if a product is effective and worth the price charged, some, including the Supreme Court and the FTC, believe that false advertising still injures the consumer. They maintain that the seller's failure to deliver the bargained-for goods and the consumers' consequent frustrated expectations constitutes real, albeit nonquantifiable, harm." (*Id.*, at 493; citing to *FTC v. Algoma Lumber Co.*, 291 U.S. 67 (1934) and Roger E. Schecter, *The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the FTC*, 1989, U. Ill. L. Rev. 571, 580.)

The impact of false advertising cannot be overstated. In 1999, total personal consumption expenditures reached $6.2 ***trillion*** dollars. (See U.S. Census Bureau, 2001 Statistical Abstract of the United States, p. 423, Chart No. 648.) As noted in Charles Shafer, *Developing Rational Standards for An Advertising Substantiation Policy*, 55 U. Cin. L. Rev. 1 (1986), a "substantial portion of those

consumer purchases result in some sort of dissatisfaction" which, in turn,

> "is a serious societal problem for a variety of reasons. It indicates a misallocation of scarce resources. It can be a significant factor in producing the perception that the economic and political institutions are unfair, ineffective, or unresponsive. That perception can have wide ranging political ramifications. Finally, it may be an indication of genuine political and economic unfairness."

(*Id.* at 1-2.)

Clearly, even if it is impossible to quantify the harm false advertising may do to a single individual, its existence in the marketplace inflicts a powerful harm on society in general. Thus, it is insupportable for the Solicitor General to argue that First Amendment protections should be unrestricted, even where admittedly false commercial speech is involved, in the absence of individualized injury to a particular plaintiff. As this Court has previously noted, it is extremely important that "the stream of commercial information flow cleanly as well as freely." (*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).) That goal can best be achieved where every form of false commercial speech can be addressed through legal actions, even when there is no evidence of harm to an individual person.

Since harm to competitors, society and the general public is inherent whenever false advertising occurs, there is ample

justification for permitting the state to regulate such conduct even where no identifiable harm to an identifiable individual exists.

II.

THE FIRST AMENDMENT'S PROTECTIONS CAN BE FULLY, FAIRLY AND PROPERLY PROVIDED IN A UCL ACTION PROSECUTED BY A PRIVATE ATTORNEY GENERAL

Contrary to the Solicitor General's assertions in its briefing, a UCL action is not a "private right of action" brought by a "private party." It is nothing more – and nothing less – than a representative action, one brought on behalf of the general public. The action can be brought by statutorily delineated representatives. (California Business & Professions Code § 17204.) The fact that the plaintiff in a UCL action is, in fact, acting as a representative has been repeatedly noted by the California courts. (*Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 126, 137, 138 (n.18); *Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1133-1134 (2001); *Massachusetts Mutual Life Ins. Co. v. Superior Court (Karges)*, 97 Cal. App. 4th 1282, 1290, n.3 (2002).)

And though that statutory delineation is broad, it is, nonetheless, not unbounded. As the California Supreme Court has noted, that representative has duties and responsibilities and must be a competent representative. (*Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4th 116, 138 (2000); *see also Rosenbluth International, Inc. v. Superior Court (Serrano)*, 101 Cal. App. 4th 1073 (2002).)

This type of private attorney general concept has a decades-long history and has been embraced by Congress as well as this Court. Since the inception of the concept in the context of the New Deal regulatory provisions as established in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), it has been legislatively endorsed by Congress on numerous other occasions in various other contexts, including the environmental, civil rights, qui tam and class action arenas. (*See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *NAACP v. Button*, 371 U.S. 415 (1963); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).)

Although the private attorney general concept has evolved over the decades (*see, e.g.*, Bryant Garth, Ilene H. Nagel, S. Jay Plager, *The Institution of the Private Attorney General: Perspectives From An Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353 (January, 1988)) and has in some respects fallen into disrepute (*see, e.g.*, Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 WTR law & Contemp. Probs. 179 (Winter 1998)), there are still sound public policy reasons why the concept remains not only a useful but vital tool in the justice system – and one whose utility should not be circumscribed, but expanded. (Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of a Businesslike Government*, 50 Am. U.L. Rev. 627, 681, *et seq.* (February, 2001) [discussing the importance of the private attorney general doctrine in the qui tam context]; Michael L. Rustad, *Smoke Signals From Private Attorneys General in Mega Social Policy Cases*, 51 DePaul L. Rev. 511 (Winter 2001) [analyzing the value of the private attorney general process in the tobacco litigation].) As Professor Rustad notes, "social policy torts empower ordinary Americans to address the

concerns of the community. . . . [¶] The whole point of social policy torts is to permit ordinary citizens to change corporate practices." (Rustad, *supra*, at 527.)

Other commentators have noted that this Court's jurisprudence has rigorously upheld legislative standing determinations similar to the UCL's, even against various "prudential barriers." (*See* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 Geo. Mason L. Rev. 237, 243 (Winter, 1999).) In this case, the California Legislature has determined the standing required for bringing a UCL action:

> Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney . . . upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.

(California Business & Professions Code § 17204.)

The California Legislature concluded that the imposition of an "injury-in-fact" requirement on the specific plaintiff was unnecessary in the context of a UCL action. Obviously, as discussed in the preceding section, that is because of the inherent injury done to the competitors and consumers and, as a result, to the public. This Court should uphold the California Legislature's determination that there is no need for personal injury-in-fact with the same rigor it affords to Congress's similar determinations.

Second, the thrust of the Solicitor General's brief appears to be that where a private attorney general is bringing the action, the "rules" will somehow change and that the change will necessarily deprive the defendant of the usual due process and other substantive and legal protections offered by the justice system. But the Solicitor General provides neither legal justification nor even anecdotal evidence to support that assertion.

Indeed, the proposition is ludicrous. Whether brought by a "private attorney general," i.e., an unharmed individual acting on behalf of the general public, or by a law enforcement or regulatory entity, such as the state Attorney General or the FTC (who – it should be noted – are similarly unharmed), the pleading standards, procedures and proof standards ***remain exactly the same***. The only thing that changes, in fact, is that the available remedies are ***more onerous*** where the action is brought by a law enforcement plaintiff. In addition to the same injunctive and restitutionary relief a private attorney general can obtain in a UCL action, a law enforcement entity can also obtain civil penalties in the amount of $2500 per violation. (California Business & Professions Code § 17206.)

The fundamental fallacy underlying the Solicitor General's brief is that standing, alone, invokes due process and constitutional protections. But that is not – and never was – the purpose of prudential standing requirements:

> In order to understand the concept of standing, its purpose must be discovered. The purpose of standing lies in the nature of the legal process and the function of our judiciary. In *Marbury v. Madison* Justice Marshall discussed the judicial

function in terms of the Court's authority to declare unconstitutional a statute enacted by Congress. Marshall's discussion serves as a fair description of the nature of judicial power in general, since any court's power to act arises from its constitutional grant of authority to decide cases and controversies between parties. Because courts are designed to settle specific disputes, they are not competent to deal with generalized grievances against society. Neither can courts give advisory opinions. Hence, the classic example: Even though Secretary of State Jefferson asked the United States Supreme Court to answer certain legal questions concerning the British blockade of French ports, Chief Justice Jay respectfully declined, since to do so was beyond the reach of judicial power.

The constitutional and judicial rejection of authority to deal with generalized grievances, as well as the rejection of authority to grant advisory opinions, arises from judicial recognition that a court's essential function is dispute settlement in accordance with legal principles, not law declaration. In the dispute-settlement process, legal principles are applied to a known, fixed set of facts, and the decision is thus limited to the application of that principle to that set of facts. Under this system, the parties come to the court with a specific claim of right (either statutory or customary) and argue that, under the peculiar facts of the case, their claim of right should be upheld. The court then chooses one of the claims of right and explains how under the facts of the particular

> case the appropriate claim of right was chosen. Without particular facts and without particular claims of right before the court, a decision of the court is not compelled by the judicial decisionmaking process.

Wallace M. Rudolph and Janet L. Rudolph, *Standing: A Legal Process Approach*, 36 Sw. L.J. 857, 858 (September, 1982).

As expressed in Rudolph, then, there are two basic reasons for requiring standing: (1) Courts should not deal with generalized grievances; and (2) Courts should not grant advisory opinions. The judicial process that demands standing thus requires: (1) A specific claim; (2) A fixed set of facts; and (3) Application of appropriate legal principles.

All of those parameters exist and those requirement are met in a UCL claim brought by a private attorney general acting on behalf of the general public – and specifically exist in the context of the action brought by Mr. Kasky against Nike:

- There is not a generalized grievance. There is, rather, an explicit and specific grievance, based on demonstrable violations. In this case, for example, Nike made false and misleading statements in a commercial context. What is notable here – and is a fact which is virtually ignored in the briefs of Nike, its amici and the Solicitor General – is that this case was decided at the pleading stage and the pleading was clear, explicit and specific: Nike made advertising statements to advance its own commercial interests and those statements

were false and misleading. That must be assumed to be true for the purposes of this decision. Thus, it is not a generalized grievance about amorphous statements are constitutionally protected. This case is raises a specific grievance in the context of expressly-stated facts.

- Similarly, no advisory opinion is sought. Rather, an actual adjudication of whether those specific statements were false and misleading is requested.

- Because those general purposes have been fulfilled, the specific requirements are similarly met:

  - There is a specific claim: Nike's statements about its business operations were made for a commercial purpose and they are false and misleading;

  - There are a fixed set of facts, predicated on the explicit pleading of the complaint about exactly what Nike did; and

  - There are specific legal principles which apply to determine the precise issue of whether Nike committed the alleged wrongs and what the consequences should be to Nike for having committed the alleged wrongs.

Thus, the prudential concerns which require standing are fulfilled in a UCL action, both generally-speaking and specifically in this case. That being true, there is no justification for the Solicitor General's unsupported foundational assertion that the First Amendment will be less stringently applied or that due process will be more lax where the representative plaintiff in the case is a private attorney general rather than a public prosecutor. In fact, that perspective impliedly, and wrongly, disparages the trial court judges and appellate justices who try and review these cases – as though they would be distracted and confounded by the presence of a private attorney general representative and would, therefore, impair or limit the defendant's rights, constitutional or otherwise. The Solicitor General's stand makes a mockery of the fundamental principle of our legal system that "Justice is Blind" and that the court does not take note of who or what either party is, but applies the laws to the facts without favoritism or bias.[2]

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2. In fact, if there is, indeed, any bias in the trial or appellate courts it is ***against*** private attorneys general, who have sometimes come to be perceived as the "bounty hunters" of the legal system during the last few years. (*See, e.g.*, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 681, n.176 (February 2001).)

CONCLUSION

This Court should not become distracted from deciding the fundamental – and important – constitutional issues here about what constitutes commercial speech based on the specific allegations in this case to the effect that, in fact, Nike was trying to sell its product when it misrepresented the nature of its business operations to existing and potential customers. The issue of standing as raised by Nike and the United States is immaterial and irrelevant because, in fact, the representative plaintiff here properly has standing to challenge false and misleading commercial speech in order to protect California's businesses and citizens from the harm that inherently results from false and misleading advertising.

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 24 2003
OFFICE OF THE CLERK

No. 02-575

IN THE
Supreme Court of the United States

Nike, Inc. *et al.*,
Petitioners,

v.

Marc Kasky,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF SIERRA CLUB, CALIFORNIA CERTIFIED ORGANIC FARMERS, AND CENTER ON RACE, POVERTY AND THE ENVIRONMENT

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QUESTION PRESENTED

Whether a state government can regulate a corporation's false statements about its labor practices, that were made in order to improve its public image and induce consumers to purchase its products, because commercial speech restrictions are permissible under the First Amendment to ensure the public receives truthful information about corporate products and services?

RULE 29.4(C) CERTIFICATION

Amici curiae certify that 28 U.S.C. § 2403(b) may apply and that this brief has been served upon the Attorney General of California.

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Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) 23

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Virginia State Bd. of Pharmacy v. Virginia's Citizens Council, 425 U.S. 748 (1976) 16, 17, 18, 21

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Carlson, *et al., A Content Analysis of Environmental Advertising Claims: A Matrix Method Approach*, J. OF ADVERTISING (Sept. 1993) 8

Cavanagh, *It's a Lorax Kind Of Market! But is it a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation*, 9 VILL. ENVTL. L.J. (1998) 11

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Federal Trade Comm'n, Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (codified at 16 C.F.R. 260 (1994)) (revised by 61 Fed. Reg. 53,311, (Oct. 11, 1996)) 11

Gardener, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 UNIV. TOLEDO L. REV. 31 (1991) 22

Holch & Franz, *Legal Developments: Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441 (1994) 7

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Luehr, *Guiding The Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising*, 10 UCLA J. ENVTL L. & POL'Y 311 (1992) 11

Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE L. REV. 377 (2001) 19

Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) 17

President George W. Bush, Speech at the Wall Street Journal (July 9, 2002) 13

Rechtschaffen, *Deference v. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998) 7

Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. OF CIN. L. REV. 1181 (1988) 17

SETTLE & ALRECK, WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 70 (1986) 19

Sierra Club, *Human Rights and the Environment, Reports and Factsheets, at* www.sierraclub.org/human-rights/factsheet.asp 14

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Weintraub, *Required Corporate Disclosure Under Security and Exchange Commission Regulations, in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORY AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK 251 (Michael B. Gerrard ed., 1999) 13

INTEREST OF *AMICI*

The Sierra Club, California Certified Organic Farmers, and Center on Race, Poverty and the Environment submit this brief as *amici curiae* in support of Respondent Marc Kasky.[1]

The Sierra Club is a nonprofit corporation organized under California law, with approximately 740,000 members nationwide, approximately 199,000 of whom reside in California. The Sierra Club is dedicated to exploring, enjoying and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

The Sierra Club's concerns include holding corporations accountable for making false environmental claims in order to exploit environmentally friendly consumers. One of the Sierra Club's campaigns is corporate accountability. This campaign encompasses encouraging corporations to demonstrate their commitment to the environment by signing voluntary codes of environmental conduct. The Sierra Club's particular interest in this case stems from the past, present and future harm to the environment that results from restricting the ability of consumers to directly influence manufacturers' environmental practices by using their purchasing power.

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[1] Letters of consent to the filing of this brief have been filed with Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6 of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person, other than *amici*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

This ability is restricted when there is no check on manufacturers' ability to disseminate misinformation.[2]

California Certified Organic Farmers, Inc. (CCOF) is a 30-year old, non-profit corporation organized under California law. CCOF has over 1200 certified organic farmers and processors in its organic certification program. CCOF's client base represents over 70 percent of organic agricultural production in the State of California, as well as hundreds of food processors throughout the United States, Canada and Mexico. CCOF's goal is to return agriculture to a biological base and away from a food production system based on toxic chemistry. CCOF is accredited by the United States Government to issue a federal organic license on behalf of the United States Department of Agriculture to its clients. Organic certification has been key to building the organic industry and CCOF has been one of the main organizations helping to develop organic standards.

CCOF is concerned when any organization makes certification claims that are without merit. Consumer confidence in the integrity of organic certification has led to annual growth rates of twenty percent within the organic industry for more than a decade. Consumers are willing to pay more for food because they believe that the methods used to produce and process organic food are better for themselves, the environment and wildlife. Allowing a business to make claims that are false or not supported by fact undermines the certification process. It is similar to allowing counterfeit money into circulation; it undermines confidence in the system. CCOF asks the court to protect the

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[2] The Sierra Club has been before the Court as an amicus curiae representing environmental interests in a number of cases. These include *Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 122 S.Ct. 2355 (2002); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *United States v. Locke*, 471 U.S. 84 (1985).

integrity of certification claims made in the marketplace and hold claimants to fact based statements.

The Center on Race, Poverty and the Environment provides legal and technical assistance to the grassroots movement for environmental justice. The Center serves individuals and community groups throughout the United States, who struggle against a disproportionate burden of pollution and the disproportionate enforcement of the law. The Center has offices in San Francisco and Delano, California. CRPE often files lawsuits under California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 et seq.) – the statute at the heart of this lawsuit – therefore, the organization's ability to represent its clients will be directly affected by the outcome of this lawsuit.

INTRODUCTION

The California Supreme Court properly held that the Constitution does not protect false or misleading public statements about the Petitioner's labor practices made in order to improve its public image and regain lost sales and credibility in financial markets – whether these statements were made in press releases, letters to newspaper editors, letters to the heads of universities and athletic departments, or advertising. Constitutional protection of free speech does not extend to a corporation's dishonest factual representations about its own product or its own operations directed to consumers, or intended to reach consumers or other members of the public, such as lending institutions and purchasers of stock.

SUMMARY OF ARGUMENT

This case is about whether or not Nike will be granted a constitutional right to lie to the public about the facts of its operations in order to promote itself and the sale of its products. Petitioner Nike filed a *demurrer* in the trial

court to Respondent's claim that it made misrepresentations in its public statements offered to rebut the criticism of its overseas labor practices. In reviewing the granting of a *demurrer*, this Court must accept all of Kasky's allegations as true. *Anderson v. Atchison, T. & S.F. Ry. Co.*, 333 U.S. 821, 822 n.1 (1948). Nike claims that it is immaterial whether it has intentionally made false and misleading statements because such lies and misstatements of fact are protected by the First Amendment. This claim conflicts with the very purpose for which *limited* First Amendment protection was extended to *some* commercial speech in the first place – the public's right to receive truthful information about products and services. Nike's claim is antithetical to the commercial speech doctrine.

It is precisely this free flow of information that is essential for consumers to make rational and *informed* choices. Consumers cannot make informed choices when it is difficult, if not impossible, to ascertain truth from fiction because manufacturers may lie with impunity.

Moreover, the confusion created when companies misrepresent, distort, or lie disrupts proper functioning of the market. Truthful and responsible manufacturers are placed at a competitive disadvantage because dishonest market participants can free-ride on the efforts of others. In particular, dishonest manufacturers exploit consumers' desires to purchase eco-friendly products from environmentally friendly corporations by falsely boasting these environmental claims. California has enacted a statute that limits such "green washing" techniques – legislation that will be put in jeopardy if this Court overturns the California Supreme Court's decision in this case.

In response to these weighty concerns, the Petitioner offers only straw men. Contrary to Petitioner's assertion, Nike's comments in this case were *not* about the merits of globalization. Rather the statements were concrete

assertions of *facts* of Nike's labor practices and the conditions under which its products are manufactured. It is impossible to state with any certainty, except as a matter of opinion, whether or not globalization is a "good" thing. By contrast, the working conditions in Nike's factories are not a matter of opinion, but rather facts that consumers are interested in obtaining to make their purchasing decisions. Consumers, large institutional purchasers, lenders, stock analysts and brokers may adjust their purchases or decisions based on this information. Fully aware of this, Nike would like to disseminate information about its labor practices that it feels would find the most favor with these audiences. However, Nike would like to disseminate favorable "information" without regard to its veracity and unfettered by any need to verify these facts – facts that Nike is in the best position to accurately report.

Despite Petitioner's assertions to the contrary, it is no more onerous to require a manufacturer to report facts about its work practices accurately than it is to expect it to provide accurate reports of its earnings for tax purposes or its financial condition to meet securities reporting requirements. The fact that this information may be difficult to compile or may sometimes be inadvertently inaccurate does not absolve the company from the responsibility to report as accurately as it can. Nike is a business entity, not a political organization, and it has a financial incentive connected to its "commentary" that other commentators lack.

Similarly, contrary to Petitioner's assertion that the California Supreme Court's decision unfairly "disadvantages" one side of a "debate," it is Nike's position that would create the disadvantage. Insulating companies from liability for inaccurate advertising of the sort alleged here would disadvantage the public – consumers, investors, analysts, and lenders alike – who have an interest in Nike's operations, how Nike's operations are viewed by the public,

and the effect of the public's view on sales. In addition, companies can gain unfair competitive advantage by falsely boasting about environmentally friendly products when the company has not undergone the expense of developing such products. Any attempts to verify such claims would require investigative journalism, as occurred in this case, but which is unreasonable to expect in most instances.

In a modern consumer society, the relative impotence of the individual consumer, compared to multi-billion dollar corporations, must be augmented by the power of the government to ensure that the information provided to the public is truthful. Protecting the integrity of the marketplace is a traditional function of government, and such regulation is an important governmental vehicle for ensuring that *public goods*, such a clean environment and sustainable environmental practices, are safeguarded.

ARGUMENT

I. False Or Deceptive Environmental Claims In Green Marketing Campaigns Can Injure Consumers And Honest Competitors And May Ultimately Endanger The Environment.

Since the early 1990's, there has been a virtual explosion throughout the United States in "green marketing" – the manufacture and promotion of consumer goods having real (or imaginary) environmental benefits. Common household products boast that they are recyclable, biodegradable, compostable, ozone-friendly, or some other shade of green. Manufacturers claim that wood products are produced only from sustainable harvesting practices, free from clear-cutting or other environmental abuses. Organic food is advertised as being produced without reliance upon agricultural chemicals or biotechnology. Energy is marketed as "clean," generated from wind, water, or solar power, not from the burning of coal or use of nuclear power. Even tuna

fish is claimed to be dolphin free. *See generally* Holch & Franz, *Legal Developments: Eco-Porn Versus the Constitution: Commercial Speech and the Regulation of Environmental Advertising*, 58 ALB. L. REV. 441 (1994).

Such green marketing efforts, which rest upon sound public policy goals, are designed to alter consumer purchasing decisions in a pro-environment way and thereby to reduce air and water pollution, promote energy efficiency, reduce global warming, prevent toxic contamination, protect wildlife, and encourage the sustainable use of natural resources from our farmlands, forests and oceans. The use of such market forces and economic incentives to protect the environment has increased in importance since the limitations of "command and control" government regulation to address the nation's serious and complex environmental problems have become more apparent. Rechtschaffen, *Deference v. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1195 (1998).

In contrast to regulatory regimes that seek to limit the amount of pollution "at the end of the pipe" through discharge permits or emission controls, consumer-oriented solutions rely upon the law of supply and demand, together with increasing public concern for the environment, to reduce pollution at the source. *Id.* Informational approaches provide an incentive for manufacturers to employ environmentally friendly practices in order to make their products more appealing to the public. Market forces - consumer purchasing decisions driven in part by environmental concerns - have changed the dynamics of environmental compliance, making it is a matter of *self-interest* for corporations to voluntarily comply with environmental requirements and even go beyond legally enforceable requirements. Harnessing the power of self-interest in the service of environmental concerns is an effective way to mobilize and accelerate positive change to a

degree difficult to achieve through governmental regulation alone.

Today, an increasing number of Americans consider themselves "environmentalists" and have expressed their concern for the environment by purchasing eco-friendly products. Almost two-thirds of consumers describe themselves as "more likely" to purchase a product because of environmental considerations. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 992 (1993). One Gallup poll found that a substantial majority of respondents was willing to change its buying behavior to improve the environment, even if it meant paying a higher price for the product. Carlson, *et al., A Content Analysis of Environmental Advertising Claims: A Matrix Method Approach,* J. OF ADVERTISING at p. 27 (Sept. 1993). Another study estimated that eighty-two percent of consumers would pay at least five percent extra to "buy green." Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 992 (1993).

Some "green" consumers base purchasing decisions on the "specific characteristics" of a product, while others, indeed perhaps most, are influenced in their purchasing decision by how a manufacturer claims a product was manufactured. People buy "dolphin-free" tuna not because of the tuna itself, which tastes the same no matter how it is captured, but because they have concern for the health and safety of dolphins. Similarly, with the deregulation of the California energy supply, fierce competition is now taking place in that market, with some competitors urging consumers to purchase from "green" sources of energy. The end product - electricity - is identical. Not buying wood products made from trees harvested in the rain forests is motivated by consumer concerns for endangered species, not by the look of the furniture itself. Other examples abound,

including the example at the heart of this case - whether Nike manufactures its products under sweatshop conditions that prospective consumers find sufficiently offensive so as to affect their purchasing decisions.

While green marketing serves the laudable goal of leveraging market forces to accomplish improved environmental protection, the use of "green washing" techniques by dishonest companies seeking to exploit consumer environmental concerns by misstating the environmental benefits of their products is, unfortunately, on the rise. "Green washing" is harmful to consumers and legitimate competitors alike, not to mention its impact on the environment itself. The inherent conflict is clear. Consumers will buy environmentally beneficial products to induce greater corporate environmental responsibility. Manufacturers striving for greater profits have an incentive to inflate or even lie about the environmental attributes of their products.

Thus, contrary to Petitioner's assertion that its statements in this case are distinct from advertising, which this Court called "the *sine qua non* of commercial profits," Petitioner's Brief at 27, Nike's statements defending its labor practices are directly related to commercial profits. If Nike is allowed to claim a constitutional right to lie in these statements to potential consumers, consumers will make purchasing decisions based on inaccurate information. This will lessen, if not eliminate altogether, consumers' ability to influence manufacturers' choices and, by extension, the benefits those choices provide to the environment.

In 1994, a 10-state attorney general task force found that "green marketing" claims were being made for nearly 10% of all new products introduced into the United States - a 20-fold increase since 1985:

> "Green marketing" has become the marketing craze of the 1990s. The American public is increasingly concerned about environmental issues and people are looking for ways to do their part to protect and restore our nation's resources. As customers have become more aware of the environmental impacts of the products they purchase, environmental awareness has begun to influence purchasing decisions.
>
> The increasing interest in the environmental consequences of purchasing decisions has not been lost on the environmental community. . . . [M]any companies have begun claiming that their products provide some benefit to the environment. . . . [T]his marketing strategy, which has become known as "green marketing," can be informative to conscientious consumers when it used honestly. Unfortunately, attempts to take advantage of consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.

Association of Nat'l Advertisers v. Lungren, 44 F.3d 726, 727 (9th Cir. 1994) (citing THE GREEN REPORT).

As a result of dishonest "green washing," honest manufacturers have less incentive to invest in research and development of green products because they are unable to capture the true profits which should come from developing "green" products. If a manufacturer incurs the cost of developing a legitimate environmentally friendly product and honestly claims the product is eco-friendly, it cannot pass the costs of production on to the consumer, because the consumer - unable to distinguish genuine from dishonest

claims - may simply purchase the cheapest product making a green claim. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991, 998 (1993).

The potential for false green advertising has led to an increased frequency of enforcement actions by states and by regulatory bodies such as the Better Business Bureau of the Federal Trade Commission. Israel, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims,* 20 B.C. ENVTL. AFF. L. REV. 303 (1993). The Federal Trade Commission began filing enforcement actions against misleading environmental marketing as early as 1973, and it has maintained an active environmental marketing enforcement program over the years. *See* Luehr, *Guiding The Green Revolution: The Role of the Federal Trade Commission in Regulating Environmental Advertising,* 10 UCLA J. ENVTL L. & POL'Y 311 (1992); *see also* Federal Trade Comm'n, Guides for the Use of Environmental Marketing Claims, 57 Fed. Reg. 36,363 (Aug. 13, 1992) (codified at 16 C.F.R. 260 (1994)) (revised by 61 Fed. Reg. 53,311, 53,316 (Oct. 11, 1996)).

Fear of deceptive advertising and consumer confusion has generated a demand for "green marketing" regulation at the state level as well. Cavanagh, *It's a Lorax Kind Of Market! But is it a Sneetches Kind of Solution?: A Critical Review of Current Laissez-Faire Environmental Marketing Regulation,* 9 VILL. ENVTL. L.J. 133 (1998). In a world of *caveat emptor,* honest information is the consumer's only defense. California has enacted remedial legislation to protect the environmental marketplace. CAL. BUS. & PROF. CODE § 17850.5. This "Green Marketing Act," which has already withstood a constitutional challenge (yet which would again be thrust into constitutional doubt if the California Supreme Court is overturned in this case), provides:

> It is unlawful for any person to make any untruthful, deceptive or misleading environmental marketing claim, whether explicit or implied. For the purpose of this section, "environmental marketing claim" shall include any claim contained in the "Guides For the Use of Environmental Marketing Claims" published by the Federal Trade Commission.

Id. § 17850.5(2).

In enacting this statute, the California Legislature recognized the important public interest in ensuring that environmental claims are truthful, declaring "that it is the public policy of the State that environmental marketing claims, whether explicit or implied, must be substantiated by competent and reliable evidence to prevent deceiving or misleading consumers about the environmental impact of products or packages. *Id.; see also* Welsh, *Environmental Marketing and Federal Pre-Emption of State Law: Eliminating the "Gray" Behind the "Green,"* 81 CAL. L. REV. 991 (1993); *Association of Nat'l Advertisers v. Lungren,* 44 F.3d 726, 727 (9th Cir. 1994). This effort would be undermined, if not completely undone, if this Court overrules the California Supreme Court's holding. Moreover, the negative impact could go much farther and cast doubt upon the government's ability to enact *any* consumer protection regulation that mandated what manufacturers could or should say both *about* their products and *in order to sell* their products.

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II. Truthful Information On Corporate Behavior Is Essential To Ensuring Corporate Accountability and Environmental Justice.

In a speech before a crowd of Wall Street business leaders, President George W. Bush announced, "[w]e must usher in a new era of integrity in corporate America . . . Self regulation is important, but it is not enough." President George W. Bush, Speech at the Wall Street Journal (July 9, 2002). Disillusioned Americans have been speaking out in droves on the need for a robust ethic of corporate responsibility, given recent financial scandals involving corporate giants such as Enron, WorldCom and Tyco, which caused public confidence in corporate America to fall to an all-time low. Similarly irresponsible corporate behavior has created the kinds of unfair labor practices, environmental destruction, health and safety violations, injury to children and overall deprivation of liberties that are at issue in this case.

In the environmental arena, accurate corporate disclosure of problems has become a mandatory obligation. The Securities and Exchange Commission requires publicly traded corporations to disclose environmental liabilities and other environmental conditions that may affect profitability. Particularly relevant to this case is the fact that even though companies are not required to report on their general environmental management policies, if they do those disclosures are required to be accurate and not misleading. Weintraub, *Required Corporate Disclosure Under Security and Exchange Commission Regulations, in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORY AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISK 251 (Michael B. Gerrard ed., 1999).

The regulation of corporate behavior is also is critical to the advancement of environmental justice. The principle of environmental justice is rooted in the belief that all people

have the fundamental right to a healthy environment, including the workplace. Dozens of laws, regulations, and policies require the incorporation of environmental justice principles and objectives. One of the most notable, Executive Order 12,898 mandates "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

Nike has been called to task for human rights, environmental and labor violations in its factories in Vietnam, China, Indonesia, Cambodia and Mexico. These human rights and environmental *injustices* bear heavily on Nike's reputation in the public eye, and Nike should be held accountable for truth in its image-making.

The global implications of Nike's behavior do not lessen the need for domestic regulation of its commercial behavior. Corporate actors sell their image in the domestic market and overseas, and in fact tend to violate the law worse in the absence of regulation. This does nothing to further democracy here or abroad.

The Sierra Club's Human Rights and the Environment Campaign echoes the U.S. Information Agency statement on promoting environmental justice and democracy: "Only through unfettered public debate and free elections can human rights be protected; only through a similar process of open debate and citizen involvement can the environment be protected. In the end, the work of environmental protection is the work of democracy." Sierra Club, *Human Rights and the Environment, Reports and Factsheets, at* www.sierraclub.org/human-rights/factsheet.asp.

The American consumer increasingly demands adherence to these same basic rights. Corporations know they ignore these morals at their risk. Several studies and business experts describe "failure to protect reputation . . . as a management failure." JUST PENSIONS: SOCIALLY RESPONSIBLE INVESTMENT AND INTERNATIONAL DEVELOPMENT-A GUIDE FOR TRUSTEES AND FUND MANAGERS 5 (May 2001). Pricewaterhouse Coopers avows: "[S]ociety increasingly demands that large multinational corporations improve their performance in areas of human rights, the environment, worker health and safety and other governance issues. Failure to address these demands has proved damaging to a company's most important asset - its reputation." *Id.* at 5 (citing Peters, *Human Rights: Is it any of your Business?* (Amnesty International, April 2000)).

Nike cannot be allowed to lie to the public about factually verifiable information such as wages and conditions in its factories, when the company's plain motives include commercial advantage. Environmental and all other forms of justice are best served by holding the company accountable for truth in its public actions.

III. The California Supreme Court's Decision Is Consistent With The Commercial Speech Doctrine And Its Emphasis On Preserving The Free Flow Of Accurate Information To Consumers.

For 200 hundred years it was thought self-evident that the government was free to regulate commercial enterprises, including their speech, to protect the commerce and the public interest. Indeed, this Court in 1942 felt the question of whether the government may regulate commercial advertising merited barely more than a sentence. *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (distribution of handbill with advertising on one side and protest on the other was advertising subject to government regulation). The years between 1942 and 1975, however, witnessed a

significant expansion in the role that advertising played in society and an increasing uncertainty as to the Constitutional status of some corporate speech, specifically advertising. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court held that commercial advertising enjoys limited first Amendment protection.

The contours of that protection were outlined more fully in *Virginia State Bd. of Pharmacy v. Virginia's Citizens Council*, 425 U.S. 748 (1976), and the Court articulated the controlling test for assessing commercial speech regulation in *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980). The resulting commercial speech doctrine represents an enclave of *limited* protection for certain types of commercial speech against a background in which most commercial speech is not considered protected by the First Amendment.[3] Thus, securities laws regulate what the issuers of securities may say about their company and its shares; legislation, regulation and the common law regulate the negotiation and enforcement of contracts; trademark and copyright law regulate what expressions may represent a form of "property," whose owners can enjoin others from using; communications between managers of different corporations can be regulated by the Sherman Act; and the criminal law may prohibit communications relating to fraud, extortion, bribery and misrepresentation. *See* Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. OF CIN. L. REV.

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[3] The backdrop against which Nike's speech takes place is one in which most speech is not protected. As Petitioner itself acknowledges, most commercial speech "had received essentially no protection at all," Petitioner's Brief at 25. The limited protection commercial speech has received is grounded entirely on the benefits to the public of receiving truthful information that is of interest to individual purchasing decisions. Thus, the default position is not, as Petitioner would have it, that if the commercial speech doctrine does not apply, full First Amendment protection does. Rather, the presumption is that the government is fully empowered to regulate commercial activity, including related speech, unless that speech is covered by the commercial speech doctrine.

1181, 1184 (1988); *see also* Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 20-21 (2000) (hereinafter Post, *Constitutional Status*) (quoting same). Thus, it is clear that all manner of "commercial" communications are not protected by the First Amendment.

Within the commercial speech doctrine, many governmental restrictions are permissible that would not be permissible under traditional First Amendment doctrine. Thus, in the area of commercial speech there is no prohibition on compelled or forced speech such as mandatory warning labels, listing of nutritional elements, chemical composition, ingredients, etc. The overbreadth doctrine and the prohibition on prior restraints are similarly suspended. *See* Post, *Constitutional Status* at 25-26. The First Amendment protection that was extended to commercial speech in the *Virginia Pharmacy* case, and which has been subsequently reaffirmed many times, encompassed only commercial speech that was "truthful and not misleading." "The First Amendment's concern for commercial speech is based on the informational function of advertising. *Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.*" *Central Hudson*, 447 U.S. at 563 (emphasis added) (internal citations omitted); *see also First National Bank of Boston v. Bellotti*, 423 U.S. 765, 783 (1978). Thus, speech that is not "truthful" does not qualify for even the limited protection available under the commercial speech doctrine.

It was because of the public interest in truthful commercial speech that this Court extended limited protection to commercial speech in the first place.

> So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic

> decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia Pharmacy at 765. Nevertheless, the Court did not conclude that because the free flow of information was "indispensable," the government was powerless to see that it was also a "clean" flow. The Court stated, "[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely." *Virginia Pharmacy* at 771-72.

To the contrary, the Court concluded that the government could, in this area, regulate precisely what it could *not* regulate in other areas - truth. This power to regulate was held unproblematic because "the truth of commercial speech . . . may be more easily verifiable by its disseminator . . . . [because it] presumably knows more about [its product] than anyone else." *Virginia Pharmacy* at 772 n.24. This applies equally here, where Nike makes representations about its products and the conditions under which they are manufactured. Although it is in the best position to know the truth regarding its manufacturing processes and products, Nike would very much like to be free of the responsibility to tell the truth.

Contrary to Nike's claim that its failure to provide truthful information in this regard is not a "commercial harm," see Petitioner's Brief at 35-37, Nike's own actions demonstrate that it regards its image as a part of what it sells to the public. Therefore, all information affecting how the company is perceived may ultimately affect sales. That Nike would like the public to perceive its products as "'cooler' than the competition's," *see* Petitioner's Brief at 27, is beyond peradventure. The public exposure of Nike's labor practices made the company's product seem "un-cool," particularly

with young college students who make up an important part of Nike's market. Nike's statements were intended to restore the "cool" to Nike. That "cool" is undoubtedly connected to Nike's labor practices and is not solely related to price, product quality and the like, as Petitioner would like this Court to believe. *See* Petitioner's Brief at 35(no suggestion that products were defective or dangerous or of lesser quality). "The physical properties of . . . goods are important only to the degree that they affect consumers' perceptions!" SETTLE & ALRECK, WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT 70 (1986) (emphasis omitted). *See also* Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE L. REV. 377, 409-10 (2001). In the clothing business, as in many other enterprises, perception is all-important. And perceptions of the sort that Nike was attempting to create are an integral part of any manufacturer's advertising and promotional efforts. This is demonstrated by the surge of companies marketing themselves as "green."

IV. Petitioner's Claims That This Decision Unfairly Balances A Debate About A Matter Of Public Concern And That It Will Have A "Chilling Effect" On Accurate Information, Should Be Rejected As Unfounded And Inaccurate.

A. This Case Is Not About The Merits Of Globalization.

Nike would like for this Court to believe that this is a case about globalization, Petitioner's Brief at 2, or "broader social and moral issues," rather than merely selling sneakers. *Id.* at 41. However, the statements at issue here were not about the merits or demerits of globalization, a subject about which reasonable people may differ. Rather, its comments were about the facts of labor conditions in its factories. Nike wanted consumers, and those in a position to influence

consumer choices through purchasing decisions or reporting, to believe that the charges made against it in the press were untrue. Kasky claims that Nike attempted to create this belief without regard to the truth of its claims. Yet Nike urges this Court recognize a Constitutional right for Nike to respond to its critics with misinformation packaged as a "valuable contribution to public understanding and discussion . . . ." *See* Petitioner's Brief at 41. It is difficult to understand how misinformation contributes anything to "public understanding." Indeed, with respect to commerce, this Court has said that misinformation most unequivocally does not contribute to public understanding, and is in fact antithetical to the well-being of the market. *See, e.g., Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it"). Nike cannot insulate itself from this responsibility by claiming that these facts are also relevant to the debate on globalization.[4]

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[4] In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Supreme Court considered whether a state university regulation that prohibited "Tupperware parties" violated the First Amendment because the company's advocacy of home economics – such as advice on how to be financially responsible and how to run an efficient home – was claimed to be "inextricably intertwined" with the sale of Tupperware. Writing for the majority, Justice Scalia first rejected the effort to categorize such speech as non-commercial, stating that: "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares . . .. Nothing in the nature of things requires [these non-commercial messages] to be combined with commercial messages." *Id.* at 474.

B. Requiring Nike To Ascertain The Accuracy Of Its Statements Before Disseminating Them Does Not Impose An Onerous Burden.

As this Court observed in *Virginia Pharmacy*, "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides *and presumably knows more about than anyone else*." *Id.* at 772 n.24 (emphasis added). This is in contrast to situations like that in *First National Bank of Boston v. Bellotti*, 423 U.S. 765 (1978), where corporations sought to contribute money and speak on issues that did not relate "to issues that materially affect its business, property, or assets," *id.* at 767, or involve matters on which it was the *source* of information rather than merely a commentator opinion. Not only is Nike in the best position to verify the truth of its own statement, it may be the only entity in a position to do so - at least without laborious, and perhaps even intrusive, investigation into those operations. If it is difficult for Petitioner to ascertain the truth of any particular representation, how much more difficult will it be for anyone outside of the company to discern the truth without its cooperation, when the information is unflattering and thus likely to hurt sales?

C. Claims Of Chilling Effects In This Context Should Be Viewed With Skepticism.

Nike claims that the "chilling effect of the legal regime approved [by California] is fact, not hypothesis or prediction." Petitioner's Brief at 38. Among other things Nike notes that it has declined to participate in the *Dow Jones Sustainability Index* and has declined to issue a Corporate Responsibility Report. *Id.* at 39. However, the argument that a modest state-imposed requirement that companies tell the truth when they characterize their products as "sweatshop-free" or "environmental friendly" will reduce the willingness of companies to make honest statements about their products should be taken with a grain of salt. It is even more doubtful that a reasonable requirement that companies tell the truth in touting their products will have a chilling effect on the willingness of members of the general public to express their views.

CONCLUSION

The citizens of California have a substantial interest in truthful information about the market, whether or not one goal of that advertising is to improve a corporation's image. All advertising attempts to improve that intangible thing - the company's "image." It is fair to say that the bulk of all advertising is directed at creating a positive "feeling" or image to be associated with the product or service. Honest competitors in the marketplace, such as those producing food organically, providing "clean" sources of energy, or using sustainable techniques to harvest natural resources, should likewise be free from the threat of unfair competitors making false claims about their environmental practices or products. *See generally*, Gardener, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 UNIV. TOLEDO L. REV. 31 (1991).

For environmental claims - no less than for the "sweatshop-free" claims present i. this case - the manufacturer has a near monopoly on relevant information, putting unknowing consumers and competitors at a serious disadvantage in their ability to investigate or refute the manufacturer's false or misleading factual statements. Representations, for example, that manufacturers use "clean" sources of energy generation or make use of only organic production practices, are based on information that is virtually impossible to "test" in the "marketplace of ideas" because it is largely in the hands of the company making

those representations. To allow fraudulent or deceptive claims in such circumstances, so long as they are also intended to promote favorable "corporate image," would allow unscrupulous companies to undermine the ability of the marketplace to steer manufacturers toward worker - and environment - friendly production processes.

A settled body of constitutional authority makes clear that states retain the ability to regulate misleading advertising, whether or not it deals with the characteristics of a product or how it was manufactured, and whether or not it was intended to promote a more favorable corporate image. *See, e.g., In re R.M.J.*, 455 U.S. 191, 203 (1982) ("[m]isleading advertising may be prohibited entirely"); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 100 (1990); *Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("our cases make clear that the State may ban commercial expression that is fraudulent or deceptive without further justification"). The Respondent in this case seeks only to enforce California's Unfair Business Practices statute guaranteeing such rights. Nothing in the United States Constitution precludes the Respondent from doing so. This Court should uphold the California Supreme Court's decision.

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DATED: This 3rd day of April, 2003.

Supreme Court, U.S.
FILED
APR 4 - 2003
CLERK OF THE COURT

No. 02-575

In The

Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1999, ReclaimDemocracy.org is a 501(c)(3) non-profit organization that works to create a representative democracy with an actively participating public. ReclaimDemocracy.org believes that citizens' influence in government should be a direct result of the quality of their ideas and the energy they put into promoting their positions, independent of wealth or status. It envisions citizens playing an active role in guiding the country and political agenda.

In advancing this vision, ReclaimDemocracy.org works to return corporations to their intended role: *business*. Corporations have a legitimate role in business, but were never intended to engage in influencing public policy, elections, education or other realms of civic society. Accordingly, ReclaimDemocracy.org seeks to inspire citizens to consciously choose what role corporations should play in society and to limit corporations to that role.

This case provides the Court with an opportunity to re-examine the judicial creation of constitutional rights for corporations. The privileges granted by the states via charters of incorporation are just that – privileges, not rights. Corporations do not, or should not, have "free speech" rights coextensive with those of individuals because corporations are artificial, state-created entities

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[1] Consents to the filing of any and all briefs *amicus curiae* have been granted by counsel for petitioners and respondent, as indicated on the U.S. Supreme Court docket. Pursuant to Rule 37.6, counsel for *Amicus* state that they authored this brief, and that this brief was not authored by counsel for any party. No person or entity other than *Amicus* and its counsel made a financial contribution to this brief.

that have no legitimate claim to a political voice. Because a reversal of the California Supreme Court's decision would further institutionalize the power of corporate wealth to distort the political process and governance of this country, *Amicus* urges the Court to affirm the lower court decision.

SUMMARY OF ARGUMENT

1. Petitioner Nike, Inc., a business corporation, seeks First Amendment protection for false factual statements about its own operations, by arguing that those statements do not constitute commercial speech under this Court's precedents. No purpose is served by parsing the distinction between commercial and non-commercial speech when a business corporation seeks to shield itself from responsibility for false factual statements about its own operations because, under such circumstances, both commercial and non-commercial speech may be regulated for accuracy. Because of its corporate status, Nike's First Amendment rights stand on a different footing than those afforded to individuals, and certainly do not include First Amendment protection for the factual assertions at issue here. Moreover, Nike is in a unique position to know the truth of its statements and its communications are unlikely to be chilled by regulation of the accuracy of statements about its own operations. To insulate Nike from liability for *intentionally misleading* the listening public regarding its own operations, far from serving the First Amendment, would instead distort the "marketplace of ideas" that the First Amendment seeks to protect. Therefore, regardless of how Nike's factual assertions are

categorized, the opinion of the California Supreme Court should be affirmed.

2. In the alternative, to the extent this Court's precedents establish First Amendment rights for corporations coextensive with those accorded to individuals, *Amicus* respectfully submits that this constitutional interpretation should be overruled. The Framers of the Constitution, the Bill of Rights, and the Civil War Amendments did not intend that the Constitution should protect corporations. Indeed, the doctrine of "corporate personhood," which has granted constitutional rights to corporations, originated with no discussion or rationale in an opinion that explicitly avoided the issue. Rather, corporations are the creatures of state law and should be subordinate, rather than superior, to the governments that create them and allow them to do business. Because the right to engage in non-commercial speech is not necessary to Nike's existence as a business corporation, this Court should hold that Nike is not entitled to such rights and should affirm the opinion of the California Supreme Court.

ARGUMENT

I. TO PRESERVE THE INTEGRITY OF THE "MARKETPLACE OF IDEAS," A BUSINESS CORPORATION'S FACTUAL STATEMENTS ABOUT ITS OWN OPERATIONS MUST BE SUBJECT TO REGULATION FOR ACCURACY, REGARDLESS OF WHETHER THEY ARE CATEGORIZED AS COMMERCIAL OR NON-COMMERCIAL SPEECH.

In this case, Nike, a business corporation, seeks First Amendment protection for false factual statements about

its own operations, by arguing that those statements do not constitute commercial speech under this Court's precedents. *Amicus* submits that no purpose is served by parsing the distinction between commercial and non-commercial speech when a business corporation seeks to shield from regulatio false factual statements about its own operations. Rega less of the pigeonhole into which they are placed, the factual assertions made by Nike may be regulated for their accuracy. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. . . . They belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (internal citations and quotations omitted).

Because nothing in this Court's precedents establishes a constitutional right for business corporations to make false statements of fact about their own operations, and regulation of the truthfulness of such statements imperils no First Amendment values, this Court should affirm the decision of the California Supreme Court regardless of how it determines the statements at issue should be categorized. *Cf. Gertz*, 418 U.S. 323 (finding no constitutional privilege

for magazine report containing defamatory falsehood, even though report regarded public issue, because individual was not public official or public figure). This conclusion is further enforced by the fact that, because of its corporate status, Nike's First Amendment rights stand on a different footing than those afforded to individuals, and certainly do not include First Amendment protection for the statements at issue here.

The speech of business corporations has been protected primarily for its presumed value to the listening public rather than because of a putative right of corporate self-expression. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities Comm'n of California* ("*PG&E*"), 475 U.S. 1, 25-26 (1986) (Marshall, J., concurring) ("I do not mean to suggest that I would hold, contrary to our precedents, that the corporation's First Amendment rights are coextensive with those of individuals. . . . In essentially all instances, the use of business property to carry out transactions with the general public will permit the State to restrict or mandate speech in order to prevent deception or otherwise protect the public's health and welfare."). In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), when the Court held that corporations could not be banned from spending money to influence the outcome of a vote on a ballot initiative, the decision rested on the right of the public not to be deprived of different views within the "marketplace of ideas" rather than on any First Amendment right of business corporations to engage in such speech. *See id.* at 777 ("The inherent worth of the speech in terms of its capacity for *informing the public* does not depend on the identity of its source, whether corporation, association, union, or individual.") (emphasis added); *see also id.* at 776, 777 & n.13 (reiterating multiple times that its

decision did not rest on any business corporation right to free speech coextensive with that of individuals). But neither *Bellotti* nor subsequent cases establish that a false factual statement by a corporation concerning its own business operations would obtain First Amendment protection under the rubric of its "capacity for informing the public." *Id.* at 777.

The "hearer-centered" basis for the protection of speech under the First Amendment is philosophically different from the traditional "speaker-centered" protection granted to individuals. *See generally* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 Brooklyn Law Review 5, 5-40 (1989). The "right to speak" protects the right of self-expression; the "right to hear," on the other hand, protects the interchange of ideas rather than protecting the dignity of the speaker. *Id.* at 15, 19. As seen in the commercial speech context, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770-772, the "hearer-centered" protection of speech allows more expansive regulation of speech than "speaker-centered" protection. Similarly, the "hearer-centered" protection accorded to business corporations allows more expansive regulation of their speech than does the "speaker-centered" protection afforded to individual citizens. *Cf. Federal Election Comm'n v. Nat'l Right to Work Committee*, 459 U.S. 197, 210-211 (1982) (restriction on solicitation by nonprofit, noncapital stock corporation for contributions to campaign committee permissible even though "governmental interest in preventing both actual corruption and the appearance of corruption ... [was] *accomplished by treating* unions, *corporations,* and similar organizations *differently from individuals.*") (emphasis added).

When speech is protected on behalf of the listener, regulations that safeguard the ability of the listener to evaluate the information and thereby protect the integrity of the "marketplace of ideas" are permissible. For example, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court upheld a regulation of corporate expenditures for political advocacy – protected for its value in the marketplace of ideas – which the Court had already determined unconstitutional as applied to a not-for-profit political advocacy organization. *Compare id. with Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238 (1986). In *Austin*, a business organization, organized as a corporation, challenged a statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office. The statute allowed corporations to make such expenditures from segregated funds used solely for political purposes. Although "expressive rights [were] implicated" by the prohibition of the use of corporate treasury funds, this Court nevertheless upheld the regulation. According to the Court, the regulation corrected for the advantages, gained by "the unique state-conferred corporate structure that facilitates the amassing of large treasuries," that corporations have over others in advancing their ideas by addressing the "distorting effects of immense aggregations of wealth ... that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. By contrast, the Court struck down the same requirement as applied to a not-for-profit political advocacy organization because the organization, which was formed for the dissemination of political ideas, did not pose the same problem of distorting the "marketplace of political ideas." *MCFL*, 479 U.S. at 257, 259.

Like the commercial marketplace, the "marketplace of ideas" needs accurate information to function efficiently. Within the "marketplace of ideas," however, the countervailing First Amendment interest in individual self-expression generally prevents regulation of the content of speech. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (noting that "right to express any thought, free from government censorship" is necessary "to assure self-fulfillment for each individual" as well as "to permit the continued building of our politics and culture"); *Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment places "the decision as to what views shall be voiced largely into the hands of each of us," not only to promote a "more perfect polity," but also "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.").

That countervailing First Amendment value has limited application to business corporations. Although the Court at times has assumed that corporations like Nike enjoy some limited "self-expressive" protection, the analyses in such cases clearly derive from the protection accorded to the listening public. *See, e.g., PG&E*, 475 U.S. at 15 (plurality opinion). Moreover, on the occasions when the Court has struck down regulations of the speech of business corporations, it has been to serve the integrity of the marketplace of ideas by preventing broad bans on speech concerning various public policy topics, *see Central Hudson Gas & Electric Corp. v. Public Service Comm'n of NY*, 447 U.S. 557 (1980) (ban on utility's promotional advertising); *Consolidated Edison Co. v. Public Service Comm'n of NY*, 447 U.S. 530 (1980) (ban on bill inserts discussing any controversial issue of public policy), or has been akin to the protection of associational rights, such that a corporation

cannot be compelled to "speak" contrary to its views, *see PG&E*, 475 U.S. 1. There is no reason to grant First Amendment protection to false factual statements made by a business corporation about *its own operations*, however, because such statements *corrupt* the marketplace of ideas without serving any countervailing interest for speech protection.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, this Court recognized that the First Amendment provides some protection of commercial speech for similar reasons: because of the "consumer's interest in the free flow of commercial information." 425 U.S. at 763. Because the speech is protected for its informational value to the public, the Court recognized that regulations protecting against false or misleading information are permissible. *Id.* at 771-772. *Virginia State Bd. of Pharmacy* explained that regulations of the accuracy of speech are permissible when the speech has "greater objectivity and hardiness" than other types of speech. *Id.* at 771 n.24. For example, commercial speech satisfies the standard because it is "more easily verifiable by its disseminator than . . . news reporting or political commentary. . . . Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Id.*; *see also Central Hudson*, 447 U.S. at 564 n.6 (identifying features of commercial speech that permit regulation for accuracy).

This rationale for the permissibility of the regulation of truthfulness is just as applicable here – regardless of whether Nike's speech is categorized as commercial or non-commercial. Nike is in the best position to verify the

accuracy of the particular speech at issue, and Nike's speech is unlikely to be chilled because it is motivated by Nike's own bottom line. The statements at issue, which concern Nike *itself* and how Nike conducts its own business, are within Nike's control and therefore Nike is in the best position to verify them. Thus, unlike in other First Amendment contexts in which the listening public may assess inaccuracies or inconsistencies by comparison with other contradictory speech, the public here cannot adequately assess Nike's speech because others have limited access to the facts.

This important fact – that the statements were about Nike itself – and the burden of proof under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, distinguish the instant case from *New York Times v. Sullivan*, 376 U.S. 254 (1964), and other defamation cases. In those cases, the facts at issue were not about the *speaker* but rather were about the plaintiff who brought the lawsuit. Moreover, the plaintiffs had only to prove the harm of the allegedly defamatory statements while the defendants, whose speech was at issue, had the burden to prove the truthfulness of the statements. This was an important factor for the Court's imposition of a heightened intent requirement in defamation cases regarding public officials. *See, e.g., id.* at 279 ("Allowance of the defense of truth, *with the burden of proving it on the defendant*, does not mean that only false speech will be deterred.") (emphasis added). Here, by contrast, the facts are about the speaker and it is the *plaintiff* – not the speaker-defendant – who has the burden of proving the falsity of the statements at issue. Thus, the procedural posture here is the mirror-image of the defamation and media cases that have come before the Court.

Moreover, Nike's communications – the communications of a business corporation – like commercial speech, are not likely to be chilled by regulation for truthfulness because of the presence of the profit motive.[2] When a business corporation acts or "speaks," it is "with a view to enhancing corporate profit and shareholder gain." 1 *Principles of Corp. Governance* § 2.01 (1994); *see, e.g., Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."). Even when a corporation engages in activity related to the public welfare or for other reasons that are not directly business-related, there is generally a business-related motive for the conduct. *See, e.g., Union Pac. RR Co. v. Trustees, Inc.*, 329 P.2d 398, 401 (Utah 1958) (concluding that corporate directors would not have made contribution to non-profit organization "if they were not confident that their company, presently and directly, would receive a quid pro quo as the resultant of good will engendered by contributions"); *Gilbert v. Norfolk & W. Ry. Co.*, 171 S.E. 814, 815 (W. Va. 1933) ("Consistent with the general rule that a private business corporation is carried on primarily for the profit of its stockholders, . . . it has, nevertheless, been generally held that such corporations may, *for the ultimate benefit of the corporation itself translated into profit*, use the funds of such corporation for purposes which might

[2] Although Nike makes several self-serving assertions regarding the speech that has already been chilled by this lawsuit, there is no support in the record of this case, which was dismissed on the pleadings and without any discovery, for any of these contentions. Pet. Br. at 38-40.

appear directly to be charitable and humanitarian.") (emphasis added); *see also* 1 *Principles of Corp. Governance* § 2.01, comment f (commenting that most corporate conduct undertaken for legal, ethical, public welfare, humanitarian, educational, or philanthropic purposes is usually "consistent with economic self-interest"). Nike's conduct – and its factual assertions – were made with an eye toward maximizing shareholder value and therefore are unlikely to be chilled if regulated for truthfulness.

Indeed, Nike admits that its conduct was motivated by the desire to maximize shareholder value. *See Pet. Br.* at 22 ("[V]irtually *everything* a company does is intended to improve its financial bottom line."). This view is also supported by various of Nike's *amici*, who state, "[B]ecause corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, *no responsible corporate spokesman speaks on a company's behalf without being concerned about the effects the statements may have on corporate sales and profits.*" *See* Brief *Amici Curiae* of Council of Public Relations Firms, the Arthur W. Page Society, the Public Relations Society of America, the Public Affairs Council, and the Institute for Public Relations, at 18 (emphasis added). But, contrary to the arguments of Nike and its *amici*, this does not make the profit-oriented motivation of the speech irrelevant in determining the constitutionality of regulating false statements about a corporation's own operations. To the contrary, it provides assurance that the kind of "chill" that sometimes prevents regulation of the accuracy of individuals' speech is unlikely to deter protected corporate speech.

Regardless of the formal "category" of Nike's speech, Respondent's lawsuit is permissible because it serves the First Amendment interests of the listening public by

protecting the integrity of the marketplace of ideas. Moreover, by establishing liability for specific asserted false factual statements, the challenged regulation is exactly tailored to ensure the accuracy of factual information asserted by a business corporation about itself in the marketplace of ideas. Accordingly, the Court should affirm the decision of the California Supreme Court.

II. IN THE ALTERNATIVE, TO THE EXTENT THIS COURT'S PRECEDENTS ESTABLISH FIRST AMENDMENT RIGHTS FOR CORPORATIONS COEXTENSIVE WITH THOSE OF INDIVIDUALS, THE COURT SHOULD USE THIS CASE AS AN OPPORTUNITY TO OVERRULE THAT CONSTITUTIONAL INTERPRETATION.

Contrary to the arguments advanced in Part I, Nike has assumed that this Court's precedents grant the same level of First Amendment protection to non-commercial corporate speech as they do to speech of natural persons. In this section, *Amicus* argues that, to the extent this Court has interpreted the First Amendment to grant protection to business corporations coextensive with that granted to individuals, this Court should use this case to overrule that constitutional interpretation.

Corporations, which are creations of state law, are not entitled to the same protections as individuals under the Bill of Rights. Corporations are artificial entities created by law for the purpose of furthering certain economic goals. A charter of incorporation is a *privilege*, not a right, conferred by state law that grants certain benefits to which a company would not otherwise be entitled. For example, the corporate form shields shareholders – the corporation's owners – from liability they would otherwise

suffer for damages caused or debts incurred by their company. *Austin*, 494 U.S. at 658. Business corporations also enjoy perpetual existence and a host of other advantages to assist in their aggregation of wealth through commercial activity. *Id.* at 658-659. Given the benefits and advantages provided by the state, it is not unreasonable for the state to regulate business corporations to ensure that they do not use the economic benefits granted by the state for unfair advantage in other arenas of civic life. *See, e.g., id.* at 659-660.

Specifically, it is reasonable for a state to regulate business corporations when they attempt to influence public policy and engage in public debate. Corporate speech, which by definition must be geared toward maximizing shareholder value over all else, does not express the views of citizens and therefore should not be given First Amendment protection coextensive with that provided to individual citizens. *See* Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 Iowa L. Rev. 995, 1033 (1998) ("Corporations ... are legally required to represent not a group of people but a legally defined set of interests – the interests of a fictional creature called a shareholder that has no associations, economic incentives or political views other than a desire to profit from its connection with this particular corporation."). Simply stated, corporations are not natural persons and should not benefit directly from the protections of the First Amendment. *PG&E*, 475 U.S. at 35 (Rehnquist, J., dissenting) ("The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.").

Neither the framers of the Constitution and the Bill of Rights nor the framers of the Civil War Amendments intended that corporations should be afforded the protections of constitutional provisions. First, although the Framers were clearly aware of corporations – state legislatures of the era chartered banks, canal companies, railroads, toll bridge companies, and trading companies as corporations – the Constitutional provisions do not specifically include corporations. *See* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings Law Journal 577, 570 n.8 (1990) (*citing* Henderson, *The Position of Foreign Corporations in American Constitutional Law, in* 2 *Harvard Studies In Jurisprudence* 1 (1918); J. Hurst, *The Legitimacy Of The Business Corporation In The Law Of The United States, 1780-1970* (1970)). The exclusion of the term "corporation" from the express language of the Constitution is therefore significant.

Case law from early in this country's history also suggests that corporations were not intended to enjoy constitutional protections. The Court consistently relied on the "artificial entity" theory, viewing the corporation as nothing more than an artificial creature of the state, subject to government imposed limitations and restrictions. Under this view, corporations cannot assert constitutional rights against the state, their creator. *See* Mayer, 41 Hastings Law Journal at 580. As Chief Justice Marshall observed:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. *Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental*

> *to its very existence.* These are such as are supposed best calculated to effect the object for which it was created.

Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819) (emphasis added) (*quoted in Bellotti*, 435 U.S. at 823 (Rehnquist, J., dissenting)).

Nineteenth century case law, both before and after the enactment of the Civil War Amendments to the Constitution, recognized that the Framers did not intend the Constitution to protect corporations as it protects natural persons. Thus, the Court ruled that corporations are not "persons" or "citizens" for purposes of Article III of the Constitution, *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), and also that corporations are neither "citizens" nor persons for purposes of the Privileges and Immunities Clause of Article IV of the Constitution, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 586-587 (1839) (foreign corporations cannot claim rights of person under Privileges and Immunities Clause of Article IV because corporation merely "artificial being created by the charter"). Subsequent to the passage of the Fourteenth Amendment, this Court determined that corporations are not citizens for purposes of the Fourteenth Amendment Privileges and Immunities Clause, *see Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 187 (1888); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) ("[C]orporations are not citizens within its meaning. The term citizens . . . applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."), and that the liberty protected by the due process clause of the Fourteenth Amendment (through which the First Amendment is

incorporated as against the states, *see Virginia State Board Of Pharmacy*, 425 U.S. at 749 n.1), "is the liberty of natural, not artificial persons," *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (*quoted in Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting)).

Even now, it is clear that business corporations do not enjoy the same level of constitutional rights or protections as natural persons. Corporations, for example, do not enjoy the privilege against self-incrimination. *United States v. White*, 322 U.S. 694, 698 (1944). They do not enjoy the protection of the privileges and immunities clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). Nor do they have a right to privacy under the Fourth Amendment. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Indeed, this Court implicitly relied on the artificial entity theory to hold that corporations do not enjoy the same First Amendment protections as individuals. *See Austin*, 494 U.S. at 660.

Although this Court on occasion has granted constitutional rights to corporations, *see, e.g. Bellotti*, 435 U.S. at 822, 824-825 (Rehnquist, J., dissenting) (identifying constitutional protections enjoyed by corporations), the Court has never provided a rationale for "personifying" corporations. Indeed, the initial grant of "personhood" under the Fourteenth Amendment to corporations was, to a certain extent, a judicial mistake. Corporate personhood is generally attributed to the Court's decision in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886), although the Court in that case specifically declined to address the issue. In *Santa Clara County*, Santa Clara County sued the Southern Pacific Railroad Company for failure to pay taxes, and the railroad presented the Court

with six defenses, including the argument that corporations were persons under the Equal Protection Clause of the Fourteenth Amendment. Because one of the other five defenses was successful, the Court had no occasion to decide the question of corporate personhood and specifically declined to do so:

> If these [other] positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.
>
> * * *
>
> As the judgment can be sustained upon this [other] ground, it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.

Id. at 411, 416. Indeed, in a companion case, Justice Field in a concurring opinion lamented that the "tax cases from California" did not "decide the important constitutional questions involved." *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 422 (1886) (Field, J., concurring).

Nevertheless, it appears that the court reporter, J.C. Bancroft Davis, included a headnote stating, "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws." *See* Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* 107 (2002) (*quoting* J.C. Bancroft Davis, 118 *United States Reports: Cases Adjudged in the Supreme Court at October Term 1885 and October Term 1886* 394 (Banks & Bros. Publishers). Perhaps as a result, in dicta in three cases over the subsequent three years, this Court cited *Santa Clara County* without explanation for the proposition that corporations are persons within the meaning of the equal protection clause of the Fourteenth Amendment.[3] *See Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-210 (1888); *Home Ins. Co. v. State of New York*, 119 U.S. 129, 133 (1886). It is notable, however, that these cases nevertheless viewed legislative classifications based in part on corporate status as permissible. *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. at 29; *Missouri Pac. Ry. Co.*, 127 U.S. at 209-210; *Home Ins. Co.*, 119 U.S. at 133.

Notwithstanding the mistaken "personification" of corporations in *Santa Clara*, the Court's subsequent rulings reveal that this Court has not consistently applied the implications of the corporate personhood doctrine

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[3] Other cases report that, during the *Santa Clara* argument, the Court interrupted counsel and stated, "The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." *Bell v. State of Maryland*, 378 U.S. 226, 262 (1964); *see also* Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* at 104. Neither the exchange that reputedly occurred during oral argument nor the Court's alleged position on corporate personhood was reflected in the written opinion issued by the Court, which specifically avoided deciding the issue.

created by *Santa Clara*. Thus, shortly after *Santa Clara*, this Court ruled that corporations are "persons" for purposes of both due process and equal protection under the Fourteenth Amendment. *Minneapolis & St. L. Ry. Co.*, 129 U.S. at 28. Nevertheless, in *Northwestern National Life Insurance Co. v. Riggs*, the Court ruled against a corporation because "[t]he liberty referred to in . . . [the fourteenth] amendment is the liberty of natural, not artificial persons." 203 U.S. at 255; *see also Hague v. Committee for Industrial Organization*, 307 U.S. 496, 527 (1939) (Stone, J., concurring) (denying non-profit corporation First Amendment rights on basis of artificial entity theory, stating, "[T]he liberty guaranteed by the due process clause is the liberty of natural, not artificial persons.").

Likewise, the Court utilized the artificial entity theory to deny corporations Fifth Amendment privileges against self-incrimination in *Hale v. Henkel*, 201 U.S. 43 (1906). The Court held that the phrase "no person" in the privileges portion of the Fifth Amendment does not suggest that corporations should be included within the amendment's protections. The majority then rendered its most expansive rendition of the artificial entity theory, drawing a sharp distinction between the individual and the corporation:

> The individual may stand upon his constitutional rights as a citizen. . . . His rights are such as existed by the law of the land long antecedent to the organization of the state, and can only be taken from him by due process of law, and in accordance with the Constitution. . . .
>
> Upon the other hand, the corporation is a creature of the state. . . . It receives certain special privileges and franchises, and holds them subject

> to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose.

Id. at 74-75.

Since the *Santa Clara* opinion, distinguished dissents have lamented corporate personhood. Justice Hugo Black famously remarked, "I do not believe the word 'person' in the Fourteenth Amendment includes corporations." *Connecticut General Life Ins. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting). Justice Douglas observed, "There was no history, logic or reason given to support that view [that corporations are persons under the Equal Protection Clause]. Nor was the result so obvious that exposition was unnecessary." *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 577 (1949) (Douglas, J., dissenting). And then-Justice Rehnquist argued that "[t]he State need not permit its own creation to consume it." *Bellotti*, 435 U.S. at 809 (Rehnquist, J., dissenting).

Then-Justice Rehnquist also opined that granting corporations political and commercial free speech rights would bring back the discredited judicial philosophy of *Lochner*-style substantive due process. *See Central Hudson*,

447 U.S. at 584, 589 (Rehnquist, J., dissenting) (protesting that striking down state regulation of corporate commercial speech was nothing more than a contemporary version of *Lochner v. New York*, 198 U.S. 45 (1905)). At least one of Nike's counsel has expressed agreement with this assessment. L. Tribe, *Constitutional Choices* 210, 214-215 (1985).

In sum, the Court should return to Chief Justice Marshall's standard for the regulation of business corporations: Corporations are entitled only to those constitutional protections that are necessary to effectuate their purpose for existence. As state creations, however, corporations should remain subject to state regulations that do not impinge on constitutional rights that are "incidental" (in the Justice Marshall sense, *i.e.* necessary) to their existence rather than become federalized by the grant of broad constitutional protections to artificial entities.

The right to non-commercial speech is not "incidental" (in the Justice Marshall sense, *i.e.* necessary) to the existence of business corporations. As stated eloquently by then-Justice Rehnquist in his *Bellotti* dissent:

> It cannot be so readily concluded that the right of political expression is equally necessary to carry out the functions of a corporation organized for commercial purposes. A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial

> Branches of the State and Federal Governments remain open to protect the corporation's interest in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed.

Bellotti, 435 U.S. at 825-826 (Rehnquist, J., dissenting).

Finally, one critical function of the First Amendment is not served in any way by granting free speech rights to business corporations: the use of communication as a means of self-expression, self-realization, and self-fulfillment. *Bellotti*, 435 U.S. at 804 (White, J., dissenting) (*citing* T. Emerson, *Toward A General Theory of the First Amendment* 4-7 (1966); *West Virginia Bd. Of Education v. Barnette*, 319 U.S. 624 (1943)). Communication by a business corporation does "not represent a manifestation of individual freedom or choice," nor does it necessarily represent the views of its shareholders, who do not share and have not invested their money for the advancement of "a common set of political or social views." *Bellotti*, 435 U.S. at 805 (White, J., dissenting). "To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality." *See PG&E*, 475 U.S. at 33 (Rehnquist, J., dissenting). When speech is not the product of individual choice and emanates from a speaker to whom "individual self-expression" is meaningless, the speech should not receive full First Amendment protection. *Bellotti*, 435 U.S. at 807 (White, J. dissenting).

Nike, a business corporation, is in the business of selling itself, its athletic apparel, and other products. Although it operates in the global marketplace, the factual assertions it made about itself and its business practices are simply not essential to its existence (except as a means to sell its products, in which case the statements at issue are commercial speech) nor were they necessary for self-expression, inasmuch as there is no "self" of a business corporation. Nike is an entity whose existence has been legislated into reality by the State and which should remain subordinate, not superior, to state government, which grants it the privilege of existence or of doing business within the state. Because the speech at issue was the speech of a business corporation, there is no reason to allow Nike to avoid defending itself against Marc Kasky's lawsuit.

CONCLUSION

For the foregoing reasons, *Amicus* urges this Court to affirm the decision of the Supreme Court of California.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 4 - 2003
OFFICE OF THE CLERK

No. 02-575

In The
Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS[1]

The National Association of Consumer Advocates (NACA) is a nationwide, non-profit corporation whose 833 members are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its *Standards And Guidelines For Litigating And Settling Consumer Class Actions* may be found at 176 F.R.D. 375 (1998).

STATEMENT OF THE CASE

Respondent Kasky filed this action in 1998, alleging that petitioner Nike, Inc. made false or misleading assertions of fact concerning the working conditions in overseas facilities where Nike's products are manufactured. (*See* First Amended Complaint, par.1.) Kasky also specifically alleges that these false or misleading assertions were made "[i]n order to maintain and/or increase its sales and profits." (*Id.* at ¶ 75, 79.) Kasky's complaint, *inter alia*, asserts claims under California's Unfair Competition Law

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel, made a monetary contribution to the brief's preparation or submission.

("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500.

The complaint does not challenge Nike's political views, nor its opinions, nor its true statements of fact. It challenges only profit-driven, false factual claims.

Nike responded to the complaint by filing a "general demurrer" under California law. (Cal. Civ. Proc. Code § 430.10(e).) All material allegations of the complaint must be accepted as true in considering such a motion. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003). In reviewing an order sustaining a demurrer without leave to amend, "the allegations of the complaint must be liberally construed with a view to obtaining substantial justice among the parties." *King v. Central Bank*, 18 Cal.3d 840, 843 (1977). Moreover, a demurrer is directed solely to the legal viability of the causes of actions themselves, without regard to what relief, if any, is sought or might ultimately be authorized.[2] *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th 553, 575 n.11 (1998). Therefore, if Kasky's complaint properly stated a claim as to any one or more of the several allegedly misleading statements, Nike's demurrer should have been overruled.

[2] Significantly, Nike did *not* follow the procedures authorized under California law for challenging particular *parts* of a complaint, including a prayer for unauthorized remedies. (Cal. Civ. Proc. Code § 435.) *See, e.g., Corbett v. Superior Court*, 101 Cal.App.4th 649, 656 (2002) (noting trial court grant of motion to strike prayer for disgorgement under UCL). Therefore, at this stage, it is unknown whether California courts would actually authorize any or all of the multiple remedies sought by Kasky, given the circumstances of this case.

SUMMARY OF ARGUMENT

Nike asks this Court to immunize a broad swath of corporate speech from consumer protection regulation. Essentially, Nike asks this Court to find that the First Amendment invalidates such regulation except in the narrow circumstance of conventional advertising claims directed to specific qualities of products sold at retail, at least unless false claims are proven to have been made maliciously. Whatever refinements, if any, to the "commercial speech" doctrine this Court should find appropriate, Nike's request for a wholesale scaling back of consumer protection regulation should be rejected.

In the Solicitor General's view, the Court should not address the substance of the First Amendment/consumer protection arguments, but instead should rule that California's broad standing provision is facially unconstitutional. However, upon closer review, the Solicitor General's argument is unpersuasive and would require this Court to effectively declare unconstitutional a large number of unrelated statutes, including the Truth In Lending Act, the Fair Debt Collection Practices Act, the Consumer Leasing Act, and the Truth In Savings Act. All of these federal statutes provide for the award of "statutory damages" even though the plaintiff fails to demonstrate reliance or damage flowing from the misleading communication or omission. Similarly, innumerable state statutes would also fail the Solicitor General's proposed test. Nor does the Solicitor General identify any persuasive reason for a constitutional distinction between private and public standing to enforce consumer protection statutes.

Finally, however this Court resolves the constitutional issues, NACA urges the Court to bear in mind the critical

importance to our national economy of statutes prohibiting deceptive advertising. The broad dissemination of truthful information about goods and services is necessary for the efficient allocation of resources. However, dissemination of *inaccurate* information distorts our economy, reduces consumer welfare and injures honest competitors. This Court should not lightly adopt any constitutional interpretation which would result in an increase in the amount of inaccurate information injected into the consumer marketplace.

ARGUMENT

I. CALIFORNIA'S BROAD STANDING PROVISION FOR CONSUMER PROTECTION ACTIONS IS NOT FACIALLY UNCONSTITUTIONAL

The Solicitor General raises a facial challenge to California's broad standing authorization in the UCL and FAL, an argument neither raised nor decided below. (Brief of the United States of America [hereinafter "USA"] at 8-9, 21-26.) NACA submits that the Solicitor General's arguments are unconvincing as a matter of precedent and policy, are based on a misperception of California law, and are not necessary to resolve the case before the Court.

A. The State of California's Decision To Authorize Equitable Actions By Non-Injured Individuals Is Not Unconstitutional

The California legislature has made the determination that the interests of California citizens are furthered by vigorous enforcement of its consumer protection

statutes. Recognizing the limited resources available to public prosecutors, the California legislature included in the UCL and the FAL authorization for individuals to act as "private attorneys general" to further that goal. As is true for a "public" attorney general, individuals fulfilling this role under California law need not have been personally injured by a practice to seek appropriate remedies. An uninjured plaintiff, however, can recover no monetary relief for him or herself.[3]

Clearly, California's statutes are unusual – perhaps unique. However, finding the provisions unique is far different than finding them unconstitutional. The Solicitor General's reasons for questioning the constitutionality of California's broad standing provisions are not persuasive.

First, in contrasting California's regime with *common law* actions for deception, the Solicitor General ignores the wide variation in elements required and remedies provided in *statutory* consumer protection statutes.

A comparison of the Solicitor General's "Question Presented" with the legal requirements for recovery of "statutory damages" under a variety of legislation illustrates the fallacy in the Solicitor General's argument. The Solicitor General's "Question Presented" is whether the First Amendment precludes statutory schemes which

[3] Neither the UCL nor the FAL provides for an award of attorneys fees to the prevailing party. Another California statute provides the possibility of an award of attorneys fees in a successful case. (Cal. Civ. Proc. Code § 1021.5.) However, such an award may be obtained only if, among other things, the plaintiff establishes that the lawsuit provided a "significant benefit" to the general public or a large class of persons. (*Id.*, subd. (a).)

permit a private party to challenge deceptive statements "if the private party himself did not rely on those statements, purchase the goods, or suffer any actual injury by reason of such reliance." (USA at I.) The Solicitor General proposes that this question be answered in the negative. Yet such an answer would compel invalidation of a large number of federal (as well as other state) statutes.

For example, the Truth In Lending Act ("TILA") provides for awards of statutory damages in certain cases. (15 U.S.C. § 1640(a)(2)(A).) To obtain statutory damages, the consumer need not show that he/she was deceived by the misstated financial disclosures or even that he/she was aware of the information in the disclosure statement. *Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877 (11th Cir. 1982); *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538 (3rd Cir. 1979); *Gilkey v. Central Clearing Co.*, 202 F.R.D. 515, 522 (E.D. Mich. 2001). Nor need the consumer show any actual injury or damages from the misstatement. *Demando v. Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000); *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998).

Similarly, under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, a debt collector is liable to any person to whom an offending communication was directed, regardless whether that person actually read or even received the communication. *Morgan v. Credit Adjustment Board, Inc.*, 999 F.Supp. 803, 805-806 (E.D. Va. 1998); *Kuhn v. Account Control Technology, Inc.*, 865 F.Supp. 1443, 1449-1450 (D. Nev. 1994). And, as with TILA, statutory damages are available under the FDCPA without proof of injury or actual damages. *Keele v. Wexler*, 149 F.3d 589, 593-594 (7th Cir. 1998); *Baker v. G. C. Services Corp.*, 677 F.2d 775, 780-781 (9th Cir. 1982). The

same point could be made about numerous other consumer protection statutes providing for "statutory damages", such as the Consumer Leasing Act, 15 U.S.C. § 1667 and the Truth In Savings Act, 12 U.S.C. § 4301.

Echoing California's reasons for its broad standing provisions in the UCL and FAL, the statutory damages provisions of these federal consumer protection statutes are often explained as providing an incentive for "private attorney general" enforcement. For example, the Third Circuit, in discussing the Truth In Savings Act, recently noted:

> We acknowledge that as a matter of policy, it seems odd to permit plaintiffs to sue banks for damages when they have personally suffered no financial loss as a result of the bank's TISA violation. [Footnote omitted.] This result, however, is what § 4310, as a "private attorney general" statute, contemplated. Although TISA authorizes the Federal Reserve Board to enforce the Act, *see*, 12 U.S.C. § 4309, the Board has limited resources to devote to enforcement, and congress may have deemed it more cost-effective to cede TISA enforcement to individuals in the private sector who stand to profit from efficiently detecting and prosecuting TISA violations.

Schnall v. Amboy National Bank, 279 F.3d 205, 216-217 (3rd Cir. 2002). *See also, Perrone v. GMAC*, 232 F.3d 433, 436-437 (5th Cir. 2000).

Similarly, many state consumer protection statutes authorize private suits for injunction (though not damages) without any showing of detrimental reliance or actual damages. (*See, e.g.*, Alaska Stat., § 45.50.535; 6 Del. Code Ann. § 2533(a); Minn. Stat. § 325D.45; 78 Okla. Stat.

§ 54(a).) As noted above, because Nike brings this petition without first testing the viability of the various forms of relief prayed for, neither the parties nor this Court can know which remedies (if any) the California courts would authorize on the facts alleged in the complaint. What is clear is that *many* states authorize *some* form of remedy for deceptive advertising without all of the "traditional" requirements described by the Solicitor General.

In any event, as the Solicitor General must acknowledge, *public* prosecutors have long been empowered to challenge deceptive advertising even though not personally injured or even exposed to the challenged practice. No one suggests that such public prosecutions violate the First Amendment. The obvious question, then, is why – from a *constitutional* standpoint – a legislative authorization to *private* attorneys general is different than a legislative authorization to *public* ones.[4] The Solicitor General notes several distinctions between private and public prosecutions (USA at 18-19), but fails to present a persuasive reason for finding these distinctions to be of constitutional significance.

First, the Solicitor General notes that government has "limited resources to prosecute consumer fraud" and therefore "must exercise their discretion so as to select for prosecution those cases that represent the best use of public resources." (USA at 18.)[5] For several reasons, this

[4] California's UCL and FAL authorize the state attorney general, each county's district attorney, and certain city attorneys to file suit on behalf of the general public. Cal. Bus. & Prof. Code §§ 17204, 17535.

[5] The Solicitor General couches all of his arguments within the context of two of the *federal* agencies charged with prosecuting consumer fraud –

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observation has no constitutional significance. As a factual matter, the accuracy of the observation is not apparent. While NACA certainly hopes and presumes that the "egregiousness" of the wrong is one significant factor in governmental prosecutors' selection of cases, it is surely not the only one. Government prosecutors are generally entitled to recover fines which may assist those agencies in funding future operations.[6] Moreover, as noted by the Solicitor General elsewhere, government enforcers are subject to political influence in exercising their prosecutorial discretion; it is far from clear that political pressure to pursue (or not to pursue) certain kinds of cases necessarily equates with "egregiousness" from a legal standpoint. In any event, the extent of prosecutorial resources provides no viable constitutional line-drawing distinction. Some state attorneys general have ample budgets available for consumer protection prosecutions, others have less. In some budget years, the FTC and Postal Service have far greater resources available than in other years. Following the Solicitor General's argument to its logical conclusion, the First Amendment would preclude public prosecutions

the Federal Trade Commission and the Postal Service. Comparing private causes of action under state law to federal agency prosecutions does not seem to be particularly helpful. However, some of the Solicitor General's argument could be applied to *state* public prosecutors, and we respond to them as if they were so stated. NACA does not understand the Solicitor General to be arguing that the First Amendment prohibits deceptive advertising suits by state public prosecutors.

[6] At the federal level, *see, e.g.*, 15 U.S.C. § 45(1) (civil fines of up to $10,000 per violation). At the state level, *see, e.g.*, Cal. Bus. & Prof. Code §§ 17206 and 17536 (civil penalties of up to $2,500 per violation in actions brought by public prosecutors, but not private plaintiffs).

by offices with large budgets, but not by those with more limited means.

Second, the Solicitor General states: "Unlike private parties, federal officials are politically accountable for their decisions. They are subject to public and congressional oversight, which creates strong incentives to exercise enforcement discretion wisely." (USA at 18.) But the Solicitor General has it backwards. From a First Amendment standpoint, "political and legislative oversight" (and, indeed, the governmental nature of the public agency itself), if anything, *increases* constitutional concerns. The First Amendment, after all, is fundamentally a restraint on *government,* not private actors. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001).[7]

Third, the Solicitor General notes that "the government has discretion in selecting remedies that balance the public interest against legitimate rights of free expression. The government may, and frequently does, seek to remedy false statements through prospective relief requiring cessation of false advertising or correction of misstatements, without pursuing restitution or disgorgement of profit." (USA at 18-19.) This argument suffers from the same defect as the previous one: It *assumes* that governmental decision-making will keep free speech interests as a primary goal. But this Court's First Amendment jurisprudence

[7] Furthermore, though a defendant sued by a private plaintiff (whether injured or uninjured) can seek early dismissal under California's SLAPP statute, those procedures are not available if the action is brought by a public prosecutor. (Cal. Civ. Proc. Code § 425.16(d).) See Section I(B), *infra*.

assumes the opposite. Indeed, the First Amendment would be a superfluous provision if our society could always rely on governmental decisionmakers to fully protect free speech interests when other governmental interests are in play.[8] Moreover, whatever remedies are *sought* in a consumer protection case, it is a court that decides which remedies should or should not be granted. This ultimate judicial control over remedies applies equally to public or private suit.

Finally, the Solicitor General suggests that the FTC's and Postal Service's long-term presence as consumer protection agencies allows development of a "coherent body of decisions on consumer fraud" and helps to provide certainty and specificity to otherwise broad statutory provisions. (USA at 19.) This observation could support an argument for precluding *all* private consumer fraud cases (as well as state public prosecutions). It is irrelevant, however, to a distinction between private suit by injured – as opposed to uninjured – plaintiffs. If "piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program" (USA at 20) may constitutionally be brought by a person who heard or read Nike's misstatements and/or purchased Nike's products, then the same is true for a plaintiff who did not.

The Solicitor General also speculates that an uninjured plaintiff might be more likely than an injured

[8] Indeed, one may wonder why the Solicitor General believes that the California legislature did not "balance the public interest against legitimate rights of free expression" when it enacted the UCL and FAL, giving certain rights to public prosecutors and certain rights to private plaintiffs.

plaintiff to prosecute a deceptive advertising lawsuit for anti-speech reasons – that is, because of disagreement with the political or social content of the speech. But the validity of this supposition is far from obvious. An "injured" private plaintiff, who discovers that an advertisement inducing his or her purchase was misleading, might well be *more* likely to sue out of anger rather than a desire for compensation or to protect the public in the future, than an "uninjured" plaintiff. And a public prosecutor, if motivated by a desire for publicity to further his or her political career, might be more likely to pursue deceptive advertising claims against a company which sells politically unpopular products or services. Constitutional principles cannot be built on such quicksand.

In summary, the arguments presented in support of the Solicitor General's proposal are not persuasive and should be rejected.

B. California Law Contains Significant Limitations On The Ability Of An Uninjured Plaintiff To Recover Monetary Relief Under The UCL

The Solicitor General assumes that "[t]he California regime allows private lawsuits that are motivated, not by the need to redress for actual harm, but rather by disagreement with the speaker's policies, practices, or points of view, or by the prospect of financial gain." (USA at 23.) But the "California regime" to which the Solicitor General objects already has in place procedures to protect against the danger posited by him.

First, though it is true that "any person" can initiate an action under the UCL, it is *not* true that "any person"

can obtain monetary relief on behalf of others. Rather, "in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties, the court may decline to entertain the action as a representative suit." *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 138 (2000). *See also, Rosenbluth International, Inc. v. Superior Court*, 101 Cal.App.4th 1073 (2002) (granting summary judgment against non-injured plaintiff who was not a competent representative). *And see, Lazar v. Trans Union LLC*, 195 F.R.D. 665, 673-74 (C.D. Cal. 2000) (declining to permit a "representative" claim for restitution where plaintiff not sufficiently typical of the injured public).

Second, because the substantive scope of the UCL is quite broad – reaching many different kinds of unfair business practices, along with deceptive advertising – the *potential* remedies are varied. While, in a proper case, relief can include significant monetary restitution, this is not a "one size fits all" statute. Even if a plaintiff (injured or not) demonstrates a violation of the UCL at trial, he/she has no *right* to any relief at all. Instead, the statute vests with the trial court the authority to fashion an appropriate remedy given all of the facts and circumstances of the case, including any equitable arguments raised by the defendant as to the appropriateness of any particular remedy. *Kraus, supra,* at 138.[9] Thus, the fact that the

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[9] Because the relevant provisions of the UCL are of relatively recent vintage, the scope of available relief in a particular case remains somewhat unsettled. Most of the cases reaching the State Supreme Court have done so on demurrers or motions for summary judgment, in which the elements of liability were at issue, not the scope of relief

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California courts have authorized substantial awards of restitution in cases involving unpaid wages (*Cortez v. Purolator Air Filtration Products, Inc.*, 23 Cal.4th 163, 178-179 (2000) or fraudulent business practices (*see, e.g., Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442 (1979) (confirming possibility of restitution)) does not necessarily mean that the California courts would authorize such a remedy in a case such as this one. Because the case reaches this Court on a motion to dismiss, in which Nike chose not to raise this issue – instead, gambling on complete dismissal of the case – this Court cannot know how the California courts would resolve the issue.[10] However, a facial attack on the statutory scheme based upon mere speculation about potential remedies should be rejected.

Third, California provides procedures for the immediate striking from a complaint of any forms of relief unsupported by the factual allegations. (Cal. Civ. Proc. Code § 435.) *See, e.g., Corbett v. Superior Court*, 101 Cal.App.4th

available under any particular factual circumstances. *See, e.g., Stop Youth Addiction, supra*, at 575 n.11 ("We express no opinion on the appropriateness of SYA's prayer for 'restitution' to be paid to the state. The cause comes before us at the demurrer stage and 'a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint.' [Citation]"). *See also, id.* at 580 (Baxter, J., concurring) (emphasizing that the question of available relief remains open on remand and expressing skepticism that restitution would be appropriate in that case).

[10] The prayer for relief in the complaint in this case predated two recent cases in which the State Supreme Court has addressed the issue of restitution. The court narrowed the available relief in both instances. *See, Korea Supply, supra*, 29 Cal.4th 1134; *Kraus, supra*, 23 Cal.4th 116.

649, 656 (2002) (noting trial court grant of motion to strike prayer for disgorgement under UCL); *Canon U.S.A., Inc. v. Superior Court*, 68 Cal.App.4th 1 (1998) (ordering nationwide class action allegations stricken where factual allegations could support, at most, a state-wide class); *Magallanes v. Superior Court*, 167 Cal.App.3d 878 (1985) (because complaint's factual allegations, if proven, would not support an award of punitive damages, prayer for punitive damages properly stricken from complaint). Therefore, there need be no concern that unsupportable claims for large monetary recovery will persist beyond the initial pleading stage. Here, of course, Nike failed to make such a motion as an alternative to its motion to dismiss. Had it done so, the California courts might well have found, under the circumstances of this case, that some of the forms of relief sought by Kasky are not available to him in this action. Therefore, in reaching its decision in this case, this Court should not pay any heed to the rank speculation that harsh remedies could possibly be imposed on Nike.

Fourth, the Solicitor General's concern that private citizens could misuse California's consumer protection statutes to target "unpopular speech" (USA at 23, 25) is amply addressed by California's SLAPP statute.[11] (Cal. Civ. Proc. Code § 425.16). *See, Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53 (2002). That statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right

[11] The acronym "SLAPP" stands for "Strategic Lawsuits Against Public Participation." *See,* Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

of petition or free speech under the United States or California constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*, subd. (b)(1).) Upon the filing of such a motion, discovery is automatically stayed and a defendant who prevails in striking part or all of the claims against it is entitled to an award of attorneys fees and costs. (*Id.*, subd. (c).)

II. THE CALIFORNIA COURT PROPERLY FOUND THAT AT LEAST SOME OF NIKE'S STATEMENTS WERE "COMMERCIAL SPEECH"

The California Supreme Court concluded that at least some of Nike's statements should be categorized as "commercial speech" under this Court's precedents, and, hence, that the case could proceed forward at this point. NACA believes that the lower court's conclusion was correct and that Nike's arguments to the contrary are unpersuasive. We wish to respond to two of Nike's points.

A. For Purposes Of The Commercial Speech Doctrine, Claims About A Product's Manufacture Or Origin Are A Type Of Product Claim

Nike repeatedly asserts that the statements challenged in the complaint did not refer to its products' characteristics or quality and therefore were not really claims about its products at all. (*See, e.g.*, Pet. at 6, 24, 35.) Nike argues that false claims about working conditions in its manufacturing facilities should be treated differently

than false claims about the quality or price of its products themselves. Further, while acknowledging that consumer purchasing decisions might have been influenced by its statements, Nike asserts, without support, that any such decisions would have been "moral" and "non-economic". (*Id.* at 22, 35-36.) In NACA's view, these arguments suffer from both philosophical and evidentiary defects.

It is true that the claims at issue in this case related to Nike's manufacturing operations, rather than to unique attributes of particular products. However, in NACA's view, this distinction is of little or no importance in resolving the First Amendment issues.

From the standpoint of traditional "commercial speech" analysis, a factual claim about a company's manufacturing facilities is likely to be at least as easily verifiable as a factual claim about the unique characteristics of a particular product. Indeed, since most companies will have far fewer manufacturing facilities than individual products, mistakenly false claims are *less* likely in the former context than in the latter.

From the standpoint of the governmental interest in protecting consumers from false or misleading marketplace information, Nike's distinction between manufacturing claims and product claims is illusory. Consumers' purchasing decisions are based on a wide variety of factors, including both product-specific and company-specific information. Government has as legitimate an interest in regulating a company's factual claims about its manufacturing operations as about other characteristics relating to the finished products sold to the public.

The significance of this governmental interest is demonstrated by the innumerable statutes regulating claims about

manufacturing circumstances. For example, many states have statutes which specifically prohibit deceptive claims that products sold to the public were made by the blind.[12] Presumably, in Nike's view, all such statutes must be declared unconstitutional limits on fully protected speech. After all, whether particular products (for example, athletic shoes) were manufactured by a blind person or a fully-sighted person is irrelevant to the quality and price of the final product. Nevertheless, some consumers are more likely to purchase products claimed to be made by the blind as part of a "moral judgment" (Pet. at 27) about the product's manufacture.

Similar examples abound. There are statutes regulating representations that products are made by Native Americans,[13] made by organized labor[14] or that the manufacturing process for the product used materials recycled from other products.[15] In none of these cases – at least

[12] Such statutes have been enacted in at least the following states: Minnesota (Minn. Stat. § 326F.47); Washington (Wash. Rev. Code § 19.06.010, *et seq.*); Wisconsin (Wisc. Stat. § 47.03); South Carolina (S.C. Code § 39-53-10, *et seq.*).

[13] *See, e.g.,* statutes passed by the states of Minnesota (Minn. Stat. § 325F.43); Arizona (Ariz. Rev. Stat. § 44-1231-01); Alaska (Alaska Stat. § 45.65.030); Montana (Mont. Code § 30-14-601, *et seq.*); South Dakota (S.D. Codified Laws § 37-7-2, *et seq.*); and Texas (Tex. Bus. & Com. Code § 17.851, *et seq.*).

[14] States with such statutes include Oregon (Or. Rev. Stat. § 661.210); Illinois (815 ILCS 425); and Idaho (Idaho Code § 44-602).

[15] States regulating such claims include Indiana (Ind. Code § 24-5-17-10, *et seq.*); Michigan (Mich. Stat. § 445.903(dd)); Minnesota (Minn. Stat. § 325E.41); and California (Cal. Bus. & Prof. Code § 17508.5). *See, Association of National Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (upholding constitutionality of California's statute).

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arguably – does the existence or non-existence of the claimed attribute affect the quality of the final product. And, certainly, it cannot be doubted that the economic status of Native Americans and persons with disabilities, and the social benefits from "recycling", are matters of public interest and debate.[16] Yet claims about such matters, if made for the purpose of increasing product sales, may be constitutionally regulated.

Moreover, the assertion that consumers are interested in the working conditions in Nike's manufacturing plants for "moral", "non-economic" reasons is without support in the evidentiary record and not at all obvious. It is quite possible that some consumers might believe that working conditions in the manufacturing plant are reflected in the quality (or quality control) of the final products. Happy, not-overly-tired workers, free from concerns about sexual or other abuse, might well produce higher quality products on a more consistent basis – or, at least, some consumers may feel that way. Thus, statements about working

On the federal level, the Federal Trade Commission has adopted a regulation prohibiting misrepresentations about the "recycled" content of products. 16 C.F.R. § 260.7(e).

[16] Beyond the categories of claims addressed by specific statutes, such as those listed above, many other similar claims are properly prohibited (if false) under general consumer protection statutes. Claims such as "We Are A Christian Company", "No Animals Were Harmed In The Making Of This Film", and "Made In The USA" may influence different purchasers differently. However, it is indisputable that such claims affect the purchasing decisions of many consumers.

conditions cannot be so easily divorced from product quality considerations.[17]

B. Improper "Viewpoint Discrimination" Is Not An Issue In This Case

Nike suggests that the application of consumer protection statutes to its claims about the working conditions in its manufacturing plants discriminates on the basis of viewpoint because other members of the public are free to criticize Nike without subjecting themselves to those statutes. (Pet. at 34-35.) This argument is unsound.

To the extent there is any "discrimination" in the application of the California statutes, it is discrimination based squarely on the fundamental justification for regulation of commercial speech itself. That is, factual claims by *a seller of goods and services* about its own products or operations made for commercial purposes are subject to reasonable regulation. Similar communications made *without* the commercial purpose of selling products or services are not subject to the same regulatory regime. For example, a claim by a manufacturer or seller that its product is of a certain quality when it is not is subject to

[17] Nike's proposed distinction between "moral" and "economic" decisionmaking is a false dichotomy. If not at the threshold of factual accuracy, where should a manufacturer's falsehoods be stopped? What if Nike's products were produced by slaves in Ethiopia? Could Nike legally conceal that fact from consumers? What if American cigarettes were produced in a Columbian factory that also processes cocaine? What if a French pharmaceutical company producing aspirin for the American market, also sells biological weapons to terrorists? NACA does not believe that the First Amendment protects concealment or misleading statements about such crucial facts.

false advertising laws. Yet if a private citizen expressed the same claim in a "Letter to the Editor," false advertising laws would not apply.

Nike is not subject to false advertising claims because of the *viewpoint* it expressed. It is subject to suit because it allegedly made false factual claims about the manufacturer of its own products. The reasons for treating such claims differently under the First Amendment are precisely those identified by this Court in its various commercial speech cases. The truth of the claims may be more easily verifiable by the speaker (*Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 772, n.24 (1976), the speech is less likely to be chilled by regulation, due to the profit motive underlying the speech (*id.*), and the speech is linked to commercial transactions over which the government has undoubted regulatory power (*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (Stevens, J.)).

Nike remains completely free to participate in the public debate about the "global economy," its effect on working conditions in underdeveloped countries, or any other issues of its choice. In doing so, however, it is rightly prohibited from making false factual claims related to the products it sells to consumers.

III. ACCURATE ADVERTISING ABOUT PRODUCTS AND SERVICES SERVES AN IMPORTANT ROLE IN OUR FREE ENTERPRISE SYSTEM; INACCURATE INFORMATION HAMPERS FAIR COMPETITION AND INJURES CONSUMERS

The broad dissemination of *accurate* information is necessary for the efficient allocation of resources in our free market economy. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (information about the availability, nature and prices of products and services "performs an indispensable role in the allocation of resources in a free enterprise system [and] serves individual and societal interests in assuring informed and reliable decisionmaking."); *Va. Pharmacy Bd., supra,* 425 U.S. at 765 (accurate information is "indispensable to the proper allocation of resources in a free enterprise system"); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 363-64 (1973) (noting testimony of the Under Secretary of the Treasury, supporting enactment of the Truth In Lending Act, that "such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers" [footnote omitted]).

Accurate information about products and services thus furthers the interests of both consumers and producers. For consumers, access to such information permits them to make welfare-maximizing purchase decisions, attuned to each consumer's personal desires. For producers, the dissemination of accurate information reduces

individual transaction costs and allows more efficient producers to reap a larger share of the available market.

However, it is only the dissemination of *accurate* information which furthers these public policy interests. The dissemination of false or misleading information (whether intentional, reckless or negligent) distorts the allocation of resources, injuring both competitors and consumers. It is a fundamental tenet of our economic system that overall consumer welfare is maximized where each individual consumer is free to make purchasing decisions based upon accurate information about the nature, quality and price of the goods and services available to them. The circulation of false information reduces consumer welfare.

Prohibitions upon false and misleading advertising are equally important to protect honest competitors. From an economic perspective, a false claim about the characteristics or circumstances surrounding one's own product is no different than a falsely disparaging claim about a competitor's product. Both tend to result in consumer purchases of the "wrong" product (*i.e.,* not the product the consumer would have selected had all accurate information been known). The person who disseminated the inaccurate information earns an undeserved profit; the competitor who did not is robbed of his or her rightful sales, due to consumers' mistaken purchases. *See generally, Serbin v. Ziebart International Corp.*, 11 F.3d 1163 (3rd Cir. 1993) (discussing the Lanham Act's purpose as protecting honest competitors against acts of "unfair competition", principally false advertising).

For these reasons, every State in the Nation, as well as the Federal Government, has enacted legislation

prohibiting false or misleading advertising.[18] This Court has repeatedly recognized the significant governmental interests underlying those statutes. *See, e.g., Edenfield v. Fane,* 507 U.S. 761, 769 (1993) ("[T]here is no question that Florida's interest in ensuring the accuracy of commercial information in the market-place is substantial."); *Va. Pharmacy Bd., supra,* 425 U.S. at 781 (Stewart, J., concurring) ("[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants protection – its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.").

These considerations apply fully to Nike's (allegedly) false and misleading statements challenged in this action. Nike falsely represented facts about the working conditions in the manufacturing facilities where its products were produced. To the extent that such working conditions are important to the purchasing decisions of some consumers, those consumers presumably were more likely to purchase Nike's products.[19] Such false advertising undermined the efforts of those of Nike's competitors who actually *did* incur greater costs to obtain higher quality working conditions in their manufacturing facilities. A competitor with more "worker-friendly" facilities should

[18] The state statutes are collected and briefly analyzed in Appendix A of the National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (5th ed. 2001). Selected consumer protection rules promulgated by the Federal Trade Commission can be found as Appendix B to the same publication.

[19] The complaint specifically alleges that Nike *intended* that its statements would make such purchases more likely. (*See, e.g.,* First Amended Complaint, par. 75.)

properly be able to command higher prices for its products from those consumers interested in rewarding such practices with brand loyalty. Yet if, as alleged, Nike injected inaccurate information about is own manufacturing facilities into the marketplace, consumers (or, at least, *some* consumers) were unable to differentiate between those brands which did have "worker-friendly" facilities, and those that did not. Thus, Nike's inaccurate statements distorted the efficient marketplace for athletic-wear, to the detriment of both consumers and competitors. California surely had and has a significant governmental interest in prohibiting such distortions.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 4 2003
CLERK

(41)

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., ET AL.,

Petitioners,

V.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF THE CAMPAIGN LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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April 4, 2003

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13 pp

QUESTION PRESENTED

Does this case implicate the Court's campaign finance jurisprudence, under which the political branches have broad authority to regulate corporate participation in election campaigns to stem the appearance and reality of political corruption?

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INTEREST OF AMICUS CURIAE[1]

The Campaign Legal Center is a non-profit, non-partisan 501(c)(3) organization established in January 2002 to represent the public interest in strong enforcement of the nation's campaign finance laws. Through its legal staff, the organization participates in the administrative and legal proceedings in which campaign finance and campaign-related media laws are interpreted and enforced. Based in Washington, D.C., the Legal Center is associated with the University of Utah's Campaign and Media Studies Program, created to support inquiry and action on these issues through academic research, conferences, and internship programs. The Legal Center's attorneys are among the counsel to the congressional sponsors of the Bipartisan Campaign Reform Act of 2002 in *McConnell v. FEC*, the litigation testing the Reform Act's constitutionality. In addition, Legal Center counsel are actively engaged as amicus or counsel in many other judicial and administrative matters in support of other litigants seeking rigorous enforcement of the nation's election laws.

Amicus curiae, as an advocate of rigorous campaign finance laws, has a strong interest in the proper interpretation and application of this Court's cases relating to corporate participation in American elections. For decades, the Court has agreed that corporate participation in candidate elections can pose unique risks of corruption, and the appearance of corruption, of our political institutions. Accordingly, the Court has recognized that the political branches have broad authority to regulate corporate contributions to, and independent expenditures in, elections for public office.

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[1] Both parties have granted blanket consent to the filing of briefs *amicus curiae* by letters of consent on file with the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amicus curiae*, their members or their counsel made a monetary contribution to the preparation of the brief.

The Court will soon have the opportunity to apply these and other first principles of campaign finance law in *McConnell v. FEC*, the case testing the constitutionality of the Bipartisan Campaign Reform Act of 2002. Amicus believes the case at bar can, and should, be decided on terms that do not prejudice that future decision.

SUMMARY OF ARGUMENT

This case presents questions involving the proper scope of state authority to define, and to regulate, speech on matters of public interest by commercial actors. Amicus supports respondent's view that the First Amendment's lower level of protection of "commercial speech" is both appropriate and compelled by this Court's precedents. We write separately, however, to urge the Court to decide this case in a manner that does not pretermit its upcoming consideration of separate issues concerning election-related speech by corporations. The campaign finance cases present, as this Court has noted, a "quite different context" from those involving non-campaign speech by commercial actors. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978). The Court will soon have the opportunity to consider the campaign finance area in *McConnell v. FEC*, No. 02-0582 (D.D.C. filed Apr. 12, 2002), the case testing the constitutionality of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The case at bar can, and should, be decided on terms that do not prejudice that future decision.

In particular, it is well-established that the government may regulate corporate campaign contributions and independent expenditures with prophylactic measures that are carefully drawn to serve sufficiently important state interests. Indeed, this Court has affirmed the constitutionality of a flat ban on corporate political contributions and expenditures, with limited exceptions. *See FEC v. Nat'l Right to Work Comm. ("NRWC")*, 459 U.S. 197 (1982); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

Those cases are distinct from the Court's jurisprudence on the First Amendment's protection of speech about public issues by commercial actors. This is true regardless of whether that speech involves matters of public debate, or proposes a commercial transaction, or, as in the case at bar, presents a closely woven fabric of the two. In *Bellotti*, the Court explained that regulation of *corporate speech on issues of public debate* presents different constitutional question than government regulation of *corporate participation in campaigns for elective office*. 435 U.S. at 788. This is, in large part, because the nature of the corporate form implicates unique concerns about political corruption and its appearance. Neither corporate speech that genuinely addresses only issues of the day, nor speech primarily defined by a commercial motive, has generally been thought to raise those concerns.

ARGUMENT

I. THE COURT'S DECISION IN THIS CASE SHOULD NOT AFFECT ITS CAMPAIGN FINANCE JURISPRUDENCE.

This case presents the Court with long-unsettled questions about the proper scope of state authority to define, and to regulate, speech by commercial actors. The Court should address these questions in a manner that does not undercut the well-established power of the political branches to regulate corporate participation in political campaigns – a subject the Court will soon have the opportunity to address again in *McConnell v. FEC*, the case testing the constitutionality of the new Bipartisan Campaign Reform Act.

A. The Court's Cases Establish that Corporate Participation in Candidate Elections May be Regulated to Prevent Political Corruption.

Contributions to political campaigns, as well as independent expenditures in elections, have been considered "political speech" at the center of the First Amendment's protections. *See Buckley v. Valeo*, 424 U.S. 1, 14-16 (1976). While those protections apply to political speech by corporations as well as to individuals, the government may regulate contributions – and, in the case of corporations, expenditures – in elections through measures that are carefully crafted to serve sufficiently important state interests. *See generally Buckley*, 424 U.S. 1; *see also Austin*, 494 U.S. 652.

In the case of corporations, the Court has consistently held that the government may freely regulate, even ban, their participation in candidate elections. *See generally NRWC*, 459 U.S. 197; *Austin*, 494 U.S. 652; *MCFL*, 479 U.S 238. This different treatment of corporations and individuals – who may contribute to candidates in limited amounts, and make independent expenditures in unlimited amounts; *see Buckley*, 424 U.S. 1 – rests on the premise that the very nature of the corporate form presents a unique risk of political corruption. As the Court has explained,

> [s]tate law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.

Austin, 494 U.S. at 658-59 (quotations omitted); *MCFL*, 479 U.S. at 257. The Court has also reasoned that

> [t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically-motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258; *see also Austin*, 494 U.S. at 659.

Government regulation in this area is therefore intended to stem the potentially corrupting influence of large-scale corporate campaign spending on the elected officials who are aided by it. *NRWC*, 459 U.S. at 209-10. This interest in preventing political corruption has long been sufficient to "support the restriction of the influence of political war chests funneled through the corporate form." *FEC v. National Conservative PAC*, 470 U.S. 480, 500-501 (1985); *see also MCFL*, 479 U.S. at 257; *Austin*, 494 U.S. at 659. Indeed, as the Court has explained, "conflict of interest legislation is 'directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." Thus, the governmental interests in preventing corruption and the appearance of corruption "directly implicate the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." *United States v. UAW*, 52 U.S. 567, 570 (1957); *see also Buckley*, 424 U.S. at 26-27; *NRWC*, 459 U.S. at 208.

This Court's cases plainly establish that legislatures have broad power to regulate corporate political speech in the form of direct participation in candidate elections. That authority should not be undermined by a decision on the proper definition of, and constitutional protection for, other forms of corporate speech.

B. The Court Should Continue to Distinguish Between Corporate Participation in Candidate Elections and Other Forms of Speech by Commercial Actors.

Amicus supports respondent's view that speech by commercial actors will often command less vigorous First Amendment protection than other protected expression. This is because such speech serves different values, because regulation of that speech serves different state interests, and because the financial self-interest which underpins commercial speech makes it especially hard to chill. *See generally Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York,* 447 U.S. 557, 562-66 (1980); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council,* 425 U.S. 748 (1976); *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). We write separately, however, to express the view that regardless of the ultimate decision in the case at bar, the Court should continue its well-established approach of treating government regulation of corporate participation in campaigns for public office as distinct from regulation of other forms of speech by commercial actors.

In *Bellotti,* the Court pointedly noted that government measures aimed at commercial speech on matters of public debate raise entirely different constitutional questions than campaign finance laws regulating candidate elections. There, the Court struck down as unconstitutional a state prohibition on corporate financial participation in a statewide referendum, explaining that

> [t]he overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of *elected representatives* through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on *issues of general public interest* implies no comparable right in the quite different context of participation in a *political campaign for election*

> *to public office.* Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.

Bellotti, 435 U.S. at 788 (emphasis supplied). Indeed, the Court has generally upheld restrictions on direct political participation by corporations in candidate elections on the grounds that they are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Austin,* 494 U.S. at 660. This case provides no rationale for changing its carefully-wrought distinction between corporate spending on candidate elections and other political speech by commercial actors.

CONCLUSION

The Court will soon have the opportunity to consider the application of First Amendment principles in the special context of campaign finance law when it hears the pending challenge to the Bipartisan Campaign Reform Act of 2002. Amicus curiae urges the Court to affirm the decision below in a manner that leaves these issues for due consideration in that case.

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Dated: April 4, 2003

Supreme Court, U.S.
FILED
APR 4 2003
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC. *et.al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR GLOBAL EXCHANGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

This brief will address the following questions, which are set forth within Question 1 of the petition for writ of certiorari:

I. Whether ensuring consumer confidence in corporate representations is in the public interest.

II. Whether a corporation's factual inaccuracies about the manufacture of its products are of material concern to consumers and affect consumers' purchasing decisions.

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OTHER AUTHORITIES

Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Acetone*. (U.S. Department of Health and Human Services, Public Health Service) (2000)	10, 11
Agency for Toxic Substances and Disease Registry, *Toxicological Profile For Toluene* (U.S. Department of Health and Human Services, Public Health Service) (2000)	11

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Bureau of Int'l Labor Affairs, Dept. of Labor, *By the Sweat and Toil of Children, Vol. IV: Consumer Labels and Child Labor*, available at http//www.dol.gov/ILAB/media/reports/iclp/sweat4/overview.htm (1997)	7
Ellen Neuborne, *Consumers Frown On Sweatshops*, USA Today, Nov. 17, 1995 at 1B.	6
Heather Hiam-White, *A Look At . . . Manufacturing Christmas: Their Labor, Our Gifts, Your Choices*, Washington Post, Dec. 20, 1998 at C3	6
Kimberly Ann Elliott and Richard Freeman, *White Hats or Don* Quixotes*? Human Rights Vigilantes in the Global Economy*, NBER Working Paper No. 8102 (Jan. 2001)	6-7, 9
Labor Standards to Get Broad Input, Journal of Commerce, Nov. 5, 1996	8
Maryland University, Program on International Policy Attitudes (2000), *American Globalization*, at http://www.pipa.org/OnlineReports/Globalization/global_rep.html	8
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NIKE, INC. *et.al.*,

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MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF FOR GLOBAL EXCHANGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

Global Exchange is a non-governmental human rights organization dedicated to promoting economic, social and environmental justice.[1] It has over 15,000 members nationwide. Global Exchange monitors multinational corporations to ensure they are accountable to consumers, workers, communities, and the environment. This case, which involves

[1] All parties have consented to the filing of this *amicus* brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no other counsel for a party authored this brief, in whole or in part, and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

the determination of the bounds of commercial speech, raises issues of fundamental interest to Global Exchange, its members, and all consumers.

SUMMARY OF ARGUMENT

Federal law has long recognized that ensuring the veracity of certain product claims by corporations is squarely in the public interest. For example, country of origin claims are regulated because some consumers prefer to purchase products made in the United States. Similarly, claims as to the recycled nature of a product's construction are regulated because some consumers prefer to purchase products made of recycled materials.

The statements at issue in this case are assertions about the labor component of Nike products—the manner in which the Nike brand shoes were assembled and the environmental and health effects of such manufacturing processes. According to the Respondent's complaint, the working conditions in Nike subcontract factories were harsh and unsafe for the employees. Respondent's Complaint cites instances in Nike subcontract factories of corporal punishment, the use of toxic solvents that exceed acceptable limits, and excessive working hours in violation of local labor codes. Despite these conditions, Nike made a series of statements that represented their subcontract factories as providing safe and healthy work environments.

Consumer choice about whether to buy a product is the function of several factors: use, price, availability, and other extra-functional characteristics of the product. Claims about the manner of production or composition of the product influence consumer purchasing decisions. For example, survey data from five academic studies conducted from 1995 to 1999 indicate that consumers will change purchasing behavior based on knowledge of "sweatshop" manufacturing practices. In surveys conducted by Marymount University

and the National Bureau of Economic Research, at least three-fourths of those polled stated that they would avoid purchasing goods if they knew that the goods were produced in unhealthy and unsafe working conditions. All five studies cited in this brief reported that at least three-fourths of survey respondents would pay more for an item that was guaranteed to be manufactured under safe and healthy working conditions.

Based on the survey data, a majority of consumers viewed the labor practices during a product's manufacture as an extra-functional characteristic that indeed influences their purchasing behavior. Just as a corporation can expect an economic boost from claiming that their product is "Made in the USA" or "environmentally friendly," a claim as to the safe and healthy working conditions during production would also have a positive effect on product sales.

Amicus urges the Court to affirm the decision of the California Supreme Court, which recognizes that corporate statements as to manufacturing and labor processes are not creative or political ideas, but inherently commercial speech.

ARGUMENT

I. THERE IS AN ESTABLISHED PUBLIC INTEREST IN ENSURING THAT CORPORATIONS TRUTHFULLY REPRESENT THE MAKE AND MANUFACTURE OF THEIR PRODUCTS.

U.S. law and practice recognize that it is in the public interest to establish a marketplace in which consumers can rely with confidence upon corporate product claims. For example, this Court has itself affirmed that it is in the public interest for consumers to have confidence in the accuracy of corporate product representation. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996) (noting the public's interest in receiving accurate commercial information); *Bates v. State of Ariz.*, 433 U.S. 350, 383 (1977) (stating that the

public and private benefits from commercial speech derive from confidence in its accuracy and reliability); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771 (1976) ("[U]ntruthful speech commercial or otherwise, has never been protected by the first amendment[.]"). Laws and regulation have likewise limited the nature of corporate product expression to protect the consumer still further. *See* 15 U.S.C.A., Ch. 2 (creation of the Federal Trade Commission (FTC)); 16 C.F.R. § 260.5 (stating that § 5 of the FTC Act makes unlawful deceptive acts and practices in or affecting commerce.). *See also Floersheim v. Weinburger*, 346 F.Supp. 950, 957 (D.C. 1972) ("[T]he purpose of the FTC is to protect not just the sophisticated, but rather the vast multitude which includes the credulous . . . who, in making purchases, do not stop to analyze but are governed by appearances and general impressions").

Consumer purchasing decisions take into account manufacturer claims regarding not only the product's functionality but also several extra-functional characteristics. The majority of extra-functional product claims that are regulated under U.S. law are those which pertain to the production or composition of the product in question: where the product was made,[2] the ingredients or composition of a product,[3] and

[2] Under the Tariff Act, U.S. Customs requires that, unless excepted, every article of foreign origin (or its container) imported into the United States be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the item permits and in a manner that indicates the English name of a country of origin. Tariff Act, 19 U.S.C. § 1304 (1999); *see also* 19 C.F.R. § 134.11 (2003).

[3] In 1990, Congress enacted the Nutrition Labeling and Education Act (NLEA), a statute aimed at substantially reforming federal regulation of food product labeling to enable consumers to make more informed choices about their diets. Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified in various sections of 21 U.S.C.). *See also* Textile Fiber Products Identification Act, 15 U.S.C. § 70 (1997) (requiring the labeling of the textile content of garments).

the potential health or environmental effects of a product's manufacture and use.[4] The statements at issue in this case are assertions about similar extra-functional characteristics of Nike products: namely, the characteristics of the labor input required to manufacture Nike brand shoes and the environmental and health effects of the manufacturing processes.

The California Supreme Court decision below should be affirmed because it protects the American consumer's long-standing interest in ensuring honest product representation. *Kasky v. Nike, Inc.*, 93 Cal.Rpt.2d 854 (Cal. 2002) ("[W]hen a business enterprise, to promote and defend its sales and profits, makes factual representations about its own products or its own operations, it must speak truthfully."). Should the Court reject the California Supreme Court decision, corporations could seek to deliberately mislead consumers as to the components and assembly of their products merely by cloaking their misrepresentations in the language of public debate.

II. NIKE STOOD TO BENEFIT ECONOMICALLY BY MAKING THE ALLEGED FACTUAL MISREPRESENTATIONS.

A. Academic studies show that consumers would change their purchasing behavior to avoid

[4] *See* Organic Certification, 7 U.S.C.A. § 6501 (1999) (purpose of certification to assure consumers that organically produced products meet a consistent standard); 16 C.F.R. § 260.2 (2003) ("The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or for commercial, institutional or industrial use."). *See also* 42 U.S.C.A. § 14301(2) (2003) (stating that uniform national labeling requirements for regulated batteries, rechargeable consumer products, and product packaging will significantly benefit programs for regulated battery collection and recycling or proper disposal).

products made under "sweatshop" manufacturing practices.

The Ninth Circuit has recognized that consumers evaluate aspects of a manufacturer's or product's social responsibility as part of their purchasing decisions. *See Association of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 733 (9th Cir., 1994) (noting that the statutes in question gave consumers information permitting them to make rational product comparisons and tradeoffs in price versus ecological "greenness"). Marymount University gathered polling data about consumer purchasing behavior specific to the apparel industry in 1995, 1996, and 1999 ("Marymount Studies").[5] For each of these years, over 75% of the consumers polled stated that

[5] Marymount University, Center for Ethical Concerns, *The Consumer and Sweatshops*, at http://www.marymount.edu/news/garmentstudy/overview.html (last visited Mar. 20, 2003) [hereinafter "Marymount Studies"]. The Marymount Studies, three separate surveys conducted by International Communications Research in 1995, 1996, and 1999, were each surveys of national random samples of approximately 1,000 of adults over eighteen years of age, half male and half female. *Id.* Data was weighted to reflect the U.S. population eighteen years of age and older, and the margin of error at the 95% level of confidence on a sample of this size is +/- 3.08%. *Id.* Although the surveys were not published outside of Marymount University's website, the Marymount Studies have been cited widely by the press, as well as by academics and the government. *See* Ellen Neuborne, *Consumers Frown On Sweatshops*, USA Today, Nov. 17, 1995 at 1B; Heather Hiam-White, *A Look At . . . Manufacturing Christmas: Their Labor, Our Gifts, Your Choices*, Washington Post, Dec. 20, 1998 at C3; U.S. Newswire, *Marymount University Survey: Consumers Don't Want Sweatshops*, Dec. 6, 1999; Robert Pollin *et. al.*, *Global Apparel Production and Sweatshop Labor: Can Retail Prices Finance Living Wages* 3 Political Economy Research Institute, University of Mass. Amherst (2002); Kimberly Ann Elliott and Richard Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy*, NBER Working Paper No. 8102 (Jan. 2001); Bureau of Int'l Labor Affairs, Dept. of Labor, *By the Sweat and Toil of Children, Vol. IV: Consumer Labels and Child Labor* (1997), available at http//www.dol.gov/ILAB/media/reports/ iclp/sweat4/overview.htm.

they would not shop at a retailer if they were aware that the garments sold at that retailer were made under "sweatshop conditions."[6] The definition of a sweatshop used in the survey was a place of manufacture in which "[employees] are forced to work long hours under extremely poor working conditions for less than minimum wage." A 1999 National Bureau of Economic Research (NBER) survey of consumers found similar results.[7] Eighty-four percent of respondents in that survey stated that they cared about the condition of workers who make the clothing they buy (46% indicated "a lot"; 38% indicated "somewhat"). As a result, 65% of those surveyed indicated that they would not buy a t-shirt made under "poor conditions" at all.[8] Furthermore, Nike, like most other major sports shoe brands, produces apparel as well as footwear.[9] These studies suggest that a corporation's brand strength, market share, revenues, and profitability could suf-

[6] Marymount Studies, *supra* note 5. The exact percentages were 78% in 1995, 79% in 1996 and 75% in 1999. *Id.*

[7] Kimberly Ann Elliott and Richard Freeman, *White Hats or Don Quixotes? Human Rights Vigilantes in the Global Economy*, NBER Working Paper No. 8102 (January 2001) [hereinafter "NBER Study"]. The polling pool in the NBER Study was randomly chosen, split sample design (posing different questions to different groups to see if responses varied with presentation of words or questions) conducted by Springfield Telemarketing. *Id* at 5. The sample size was 726. Telephone interview with Richard Freeman, co-author of NBER Study, Herbert Ascherman Chair in Economics at Harvard University (Mar. 15, 2003). There was not a survey-specialized definition of "poor conditions," "good conditions." *Id.*

[8] NBER Study, *supra* note 7 at 55-56.

[9] Nike, with other shoe producers such as Reebok, L.L.Bean and Patagonia, were original members of the Clinton Administration's 1996 Apparel Industry Partnership, formed to create labor standards for the apparel and footwear industry. *Labor Standards to Get Broad Input*, Journal of Commerce, Nov. 5, 1996 at 3A.

fer substantially from having its products identified as being manufactured under these "sweatshop" working conditions.[10]

Studies that indicated a stated willingness on the part of consumers to pay a premium for products made in "sweatshop-free" conditions further suggest that the labor component of a corporation's product is an extra-functional product characteristic that is discretely valued by the consumer. A 1999 study by the Program on International Policy Attitudes (PIPA) found that if consumers were given the choice between a less expensive garment made in harsh and unsafe working conditions, and a more expensive garment certified as not being made in such sweatshop conditions, 75.7% of respondents indicated that they would purchase the more expensive shirt made in a safe and healthy working environment. The premium presented for the more expensive garment was $5.00.[11] The aforementioned 1999

[10] Sweatshop is defined as "a usually small manufacturing establishment employing workers under unfair and unsanitary conditions." Webster's Unabridged Dictionary 2308 (3d ed., 1993).

[11] Maryland University, Program on International Policy Attitudes (2000), *American Globalization* at http://www.pipa.org/OnlineReports/Globalization/global_rep.html (last visited Mar. 25, 2003). [hereinafter PIPA Study]. The Program on International Policy Attitudes (PIPA) is a joint program between the Center for Policy Attitudes and the Center for International and Security Studies, School of Public Affairs, Maryland University. *Id.* The PIPA poll was conducted by Research Data Design and Communications Center, Inc. on October 21-29, 1999, with a sample of 1,826 American adults (18 years or older). *Id.* Respondents were chosen from all households in the continental United States by a random digit-dialing sample, and were interviewed by telephone, using a survey designed by PIPA. *Id.* Interviewers observed gender and region quotas, and questions that were asked of the entire sample have a margin of error of +/- 2.3%. *Id.* This survey was also broadly reported in the press. *See* Richard Morin and Claudia Deane, *The Ideas Industry; Pointed Parody May Be Price of Success*, The Washington Post, Feb. 15, 2000 at A21; *World Trade Body Comes Under Fire Before Talks Open; Buchanan*

NBER study corroborated this finding, with 81% of respondents indicating they would pay more for an item if they could be assured it was made under "good conditions." For a $10 item, consumers were willing to pay $2.78 more; for a $100 item, consumers were willing to pay $14.99 more. The Marymount Studies echoed this finding, with consumers stating their willingness to pay incrementally more for a garment if they knew that the garment was manufactured in a "legitimate shop".[12] For the years 1995, 1996 and 1999, at least 83% of the consumers polled stated they would pay a $1 premium on a $20 garment, if it were guaranteed that the garment was produced in a "lēgitimate shop".[13] This survey data indicates that consumers evaluate and value the labor and conditions surrounding a product's assembly as a discrete, extra-functional component in their purchasing decisions.

B. The working conditions in Nike subcontract factories were harsh and unsafe, correlating with what consumers defined as "sweatshops."

The Respondent's Complaint cites a Nike-commissioned audit conducted by Ernst & Young of the Tae Kwang Vina plant ("VT") in Vietnam that catalogued several serious

Assails U.S. Accord With China As a Giveaway; Teamsters Blast "Corporate Greed," St. Louis Post-Dispatch, Nov. 29, 1999 at A1.

[12] "Legitimate shop" was undefined in the survey. Marymount studies, *supra* note 5. The common definition of legitimate in this context is "conforming to recognized principles or accepted rules and standards." Webster's Unabridged Dictionary 1291 (3d ed., 1993).

[13] The exact percentages were 84% in 1995, 83% in 1996 and 86% in 1999. Marymount Studies *supra* note 5.

health and safety violations.[14] This Ernst & Young audit stated that the acceptable levels of toluene, a solvent used in sneaker production, exceeded the Vietnamese legal limit from 6 to 177 times. Compl. ¶ 42.

Toluene is a hazardous air pollutant,[15] and numerous studies have documented its ill effects on humans. In studies of workers repeatedly exposed to toluene at lower concentrations, from 30 to 150 parts per million ("ppm"), workers exhibited performance deficits in neurobehavioral tests, hearing loss, and vision color impairment.[16] In the mid-1990s studies of persistent inhalation exposure to toluene between 4,000—12,000 ppm, showed evidence of residual or permanent neurological damage as evidenced by structural changes in the brain—tremors, paranoid psychosis, recurrent hallucinations, impaired speech, hearing and vision, and death.[17] Toluene exposure can also cause significant physical damage to the human tissues and organs, including the liver,

[14] Steven Greenhouse, *Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*, The New York Times, Nov. 8, 1997 at A1. *See also* Tim Connor, *Still Waiting for Nike to Do It* 7-9 (Global Exchange, 2001).

[15] As listed by the EPA. Agency for Toxic Substances and Disease Registry, *Toxicological Profile For Toluene* 222 (U.S. Department of Health and Human Services, Public Health Service) (2000) [hereinafter "ATSDR Toluene Toxicological Profile"].

[16] *Id.* at 60 - 64 (citing K.W. Boey, S.C. Foo, J. Jeyaratnam, *Effects of Occupational Exposure to Toluene: A Neuropsychological Study on Workers in Singapore*, 26(2) Ann. Acad. Med. Singapore 84-7 (1997); C. Abbate, C. Giorgianni, F. Munao, *et. al.*, *Neurotoxicity Induced by Exposure to Toluene. An Electrophysiologic Study*, 64 Int. Arch. Occup. Environ. Health 389-392 (1993); M. Zavalic, Z. Mandic, R. Turk, *et. al.*, *Quantitative Assessment of Color Vision Impairment in Workers Exposed to Toluene*. 33(3) Am. J. Ind. Med. 297-304 (1998); M. Zavalic, Z. Mandic, R. Turk, *et. al.*, *Assessment of Color Vision Impairment in Male Workers Exposed to Toluene Generally Above Occupational Exposure Limits*. 48(3) Occup. Med. 175-180 (1998)).

[17] *Id.* at 59.

kidneys, skin, and eyes.[18] Repeated exposure and high levels of toluene have been linked to developmental problems in children born to female workers exposed during pregnancy. The Agency for Toxic Substances and Disease Registry ("ATSDR") has equated the prenatal effect of inhaling large amounts of toluene and other solvents during pregnancy with fetal alcohol syndrome.[19] Relevant studies reported growth deficiencies, central nervous system abnormalities, and limb deformations in fetuses exposed to high levels of toluene.[20]

The Ernst and Young audit of the VT factory in Vietnam also stated that the level of acetone exceeded the acceptable standard from six to eleven times. Compl. ¶ 42. These levels appear to be sufficient to cause significant adverse effects. According to relevant studies, neurological and behavioral effects such as chronic headache, lack of energy, general weakness, and delayed visual reaction time have been observed in humans exposed to 250 ppm acetone for 5.25 hours or repeatedly for 6 hours/day for 6 days.[21] Lightheadedness and throat irritation are evident at 1000 ppm.[22] The Ernst & Young reports suggests that an individual working at the VT factory in 1996 was at risk for serious and permanent injury—and this would be true even accepting the two- to three-year exposure limit for contract workers claimed by Nike. Compl. ¶ 44. Thus, these conditions, if reported accurately by Ernst & Young, would meet the definition of

[18] Tim Connor, *Still Waiting for Nike to Do It* 7—9 (Global Exchange, 2001) (citing ATSDR Tolunene Toxicological Profile).

[19] ATSDR Toluene Toxicological Profile, *supra* note 15 at 136.

[20] *Id.*

[21] Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Acetone*. 92 (U.S. Department of Health and Human Services, Public Health Service) (2000).

[22] *Id.* at 24.

unhealthy, "sweatshop" working conditions as measured by the aforementioned survey data.[23]

The Respondent's Complaint also highlights alleged instances of harsh treatment of workers in Nike's Vietnamese subcontractor factories. Alleged instances of corporal punishment by supervisors in Nike subcontract factories include: forcing female workers to run around a track as punishment for wearing non-regulation shoes, forbidding workers from using the bathroom more than once in an eight-hour shift, and striking workers on the head for poor sewing performance. Compl. ¶ 29. According to the Vietnam labor code, employers may discipline employees in only three ways: by verbal or written reprimand, transfer to lower pay for a limited term, or dismissal.[24] In all cases, disciplined employees have the right to present their own case or to ask for the assistance of a lawyer, a people's defense counsel, or other person for their defense.[25]

Additionally, the Complaint gave specific instances in Vietnam and China in which workers in Nike subcontractor factories were required to work illegally long hours. At the Wellco Plant in China, the Asia Monitor Resource Center reported that the factory required workers to work eleven hours each day, and granted only one to two days off every month. Compl. ¶ 32. At the Yue Yuen Factory, also in China, workers were reported as working ten to twelve hours a day, six or seven days a week, plus an additional two hours of overtime each day. Compl. ¶ 32. Such excessive, compulsory working hours contravene China's labor code: the

[23] *See supra* notes 5—13 and accompanying text.

[24] Vietnam Labor Code Art. 84 (1994).

[25] Vietnam Labor Code Art. 87 (1994).

code mandates that workers are required to have one day off in seven,[26] and that workers shall not work more than eight hours a day, or forty-four hours a week on average.[27]

The Complaint cited similar violations in the Vietnamese manufacturing facilities: The Ernst &Young audit of the VT factory examined the payroll of fifty workers at the VT plant; forty-eight of those employees had been required to work overtime. Compl. ¶ 34. Vietnam Labor Watch reported that most workers who make Nike products are forced to work 500 hours or more of overtime. Compl. ¶ 36.The Vietnam labor code states that overtime is allowed, but shall not exceed four hours in a day and 200 hours in a year.[28] Therefore, the Complaint's descriptions of such mandatory, immoderate hours of work in Nike subcontract factories would meet the requisite "long hours" of sweatshop working conditions, as measured by survey data discussed above.[29]

C. Nike's statements represented their subcontract factories as providing safe and healthy work environments.

The Respondent's Complaint cites several instances in which Nike stated that the working conditions in its subcontractor factories met relevant governmental and internal standards. Nike's 1996 Memorandum of Understanding established that Nike assumes responsibility for ensuring that subcontractors comply with applicable governmental health and safety standards. Compl. ¶ 39. In a 1996 letter to

[26] China Labor Code, Art. 38 (1994). China's labor code does allow for the working hours to be extended due to the "requirements of production" but puts limits such extensions to three hours per day, not to exceed 36 hours in a month. *Id* at Art. 41.

[27] China Labor Code, Art. 36 (1994).

[28] Vietnam Labor Code, Art. 69 (1994).

[29] *See supra* notes 5—13 and accompanying text.

University Presidents and Athletic Directors, Nike represented that the Nike Memorandum of Understanding certifies Nike compliance with "applicable government regulations regarding occupational health and safety." Compl. ¶ 39. Additionally, in a widely distributed press release, "The Nike Code of Conduct: What it is, How it Works" Nike represented that "key provisions of the code include: . . . zero tolerance of corporal punishment or abuse, or of harassment of any kind." Compl. ¶ 28. Therefore, it is reasonable to believe that consumers reading Nike's statements with confidence would infer that Nike employed subcontractors that provided safe and healthy working conditions for their employees.

D. It is reasonable to assume that Nike's alleged factual misrepresentations had a beneficial effect on product sales.

Academic survey data indicates that consumers in the last half of the 1990s would change their purchasing behavior if they knew a corporation's products were manufactured under "sweatshop" conditions. The unsafe and unhealthy working conditions at Nike subcontract factories alleged in the Respondent Complaint correspond with what polled consumers would have likely deemed "sweatshop" practices. Therefore it is reasonable to assume that Nike's representations of its subcontractors as operating safe and healthy work environments provided Nike with material benefit, by permitting it to avoid a loss of brand strength, shoe and apparel product sales, and overall corporate profitability.

The alleged misrepresentations made by Nike concern how and in what manner their products are made. These extra-functional product characteristics are of material import to consumers and are similar to those that this Court and U.S. society have considered inherently commercial. Consumers have indicated that they value the character of the labor input

into a product just as they would any other product attribute. Nike's likely economic benefit from these representations concerning its manufacturing practices is a further indication that the speech in question should not be considered political or creative, but commercial.

CONCLUSION

Factual misrepresentations made by corporations are simply not entitled to constitutional protection. Such restrictions on commercial speech have long been recognized. In this respect, the decision of the California Supreme Court merely reaffirms a basic commitment to truth and honesty in commercial transactions. For these reasons, *amicus* respectfully urges the Court to affirm the judgment of the California Supreme Court.

Respectfully submitted,

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Supreme Court, U.S.

APR 4 - 2003

No. 02-575

In The Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARK KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT BY MEMBERS OF THE UNITED STATES CONGRESS, REPRESENTATIVES DENNIS J. KUCINICH, BERNARD SANDERS, CORRINE BROWN, AND BOB FILNER

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INTEREST OF *AMICUS CURIAE*

This brief is filed by members of the United States Congress who are deeply concerned about the potential for the Court's decision in this case to endanger federal and state consumer protection laws.* This case poses a crucial issue: May a company intentionally make false factual statements to consumers in an effort to increase product sales? If Nike prevails in its arguments, companies will feel emboldened to lie to consumers about a vast array of issues, undermining laws that Congress and state legislatures have enacted to protect the integrity of the marketplace.

This brief is filed by four members of the United States House of Representatives who have long been involved in ensuring protection of consumers in the United States: Dennis J. Kucinich, Representative from the 10th Congressional District in Ohio; Bernard Sanders, Representative at large from Vermont; Corrine Brown, Representative from the 3rd Congressional District in Florida; and Representative Bob Filner, Representative from the 51st Congressional District in California.

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* Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this brief, in whole or in part, and that no person, other than *Amicus* and its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and letters of consent have been filed with the Clerk of this Court.

INTRODUCTION

May a company selling tuna fish tell consumers – in advertisements, letters to environmental groups, and elsewhere – that its tuna is caught in a dolphin-safe manner, when it knows that its nets regularly capture and kill dolphins? May a cosmetics company tell consumers – through advertisements, letters to department stores, and otherwise – that it does not test its products on animals, even though it knows that this is untrue and that it regularly uses animal testing in a way that many of its customers would find repugnant? May an agricultural company tell consumers that its products are organic, when it knows that this is false and that it uses pesticides and herbicides? May a manufacturer represent that its products were "made in the United States" or produced with union labor, when it knows those statements are untrue?

The issue in this case is whether the First Amendment protects a company's making false factual statements about its products, likely to matter greatly to some consumers in their purchasing decisions, in an effort to increase sales. That is exactly what occurred here. Nike wrote letters to current and prospective customers – college and university administrators and athletic directors – making false factual assertions about its products for the purpose of continuing and increasing its sales. Nike made similar assertions in newspapers, including in paid advertisements, as part of a public relations campaign designed to bolster sales among those consumers who care about the conditions under which Nike products are made. The question in this case is whether a state can constitutionally prohibit such false speech.

The position taken by Nike and its *amici* fails to recognize that consumers may care more about the conditions under which goods are produced – whether the tuna is caught in a dolphin-safe manner, whether cosmetics are tested in a "cruelty-free" way, whether the produce is organic, whether the shoe company produces its products in "sweatshops" with inadequate wages and working conditions – than the price, ingredients, or caloric content. *Amicus curiae*, members of the Congress of the United States, submit this brief because of concern that if Nike's position is accepted, false advertising and consumer protection laws of the United States and the 50 states will be seriously undermined.

ARGUMENT

I. FACTUAL STATEMENTS BY A MANUFACTURER TO CONSUMERS ABOUT ITS PRODUCTS, WITH THE OBJECTIVE OF INCREASING SALES, ARE COMMERCIAL SPEECH

A. The Distinction Between Commercial And Non-Commercial Speech Is Important And Necessary Because The Marketplace Of Ideas Will Not Protect Consumers From The Harms Of False Statements

This Court has consistently and unequivocally held that commercial speech is a distinct category of expression which is not afforded the same First Amendment protection as noncommercial speech. In *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980), this Court "recognized the commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to

government regulation, and other varieties of speech." The Court thus expressly declared that "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-63 (citation omitted).

Commercial speech must be regarded as a distinct category of expression, this Court has held, for three reasons. First, "the truth of commercial speech . . . may be more easily verifiable by its disseminator" because the speaker provides "information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Virginia State Bd. of Pharmacy v. Va. Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976). Second, commercial speech is less easily chilled because commercial speakers have an economic incentive to speak which counteracts any chilling effect that might occur from regulation. *Id.* Third, "the interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 n.21 (1993). False commercial speech causes economic harms to consumers who are deceived into buying products and services that do not meet their needs or expectations. As Justice Stevens observed: "The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explains why we tolerate more governmental regulation of this speech than of most other speech." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring).

All of these concerns are strongly implicated in this case. First, Nike is in the best position to know about the

conditions under which its products are manufactured. Nike makes much of the difficulty of overseeing its far-flung network of contractors around the globe. Pet. Br. at 40. But as compared to consumers, it still has far better access to the evidence concerning the working conditions in places where its products are made. Moreover, surely the distinction between commercial and noncommercial speech cannot rest on the size or the subcontracting practices of a seller of products. If Nike were to lie to its customers about the quality of its shoes or materials from which they are made, it should enjoy no greater constitutional protection from a false advertising suit than a small company. Because California's Unfair Competition Law and False Advertising Law do not impose strict liability,[1] the appropriate way to deal with the truth of Nike's assertions is in a defense, not by granting it blanket constitutional protection.

Second, Nike's strong economic incentive to maintain and expand sales of its products, even in the face of anti-sweatshop criticism, will ensure that it will continue speaking out about its labor practices. Nike argues that the prospect of liability chills the company's speech. Pet. Br. at 38-39. But *nothing* in the record of this case supports this factual assertion. Nike asserts that it has

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[1] As discussed below, there is no basis for Nike's claim, Pet. Br. at 43, that the California unfair competition law, Cal. Bus. & Prof. Code §17200 *et seq.*, creates strict liability. The California Supreme Court did not so hold and, in fact, did not discuss the question of scienter because Nike did not raise the issue below. Moreover, Kasky's complaint is not based on a theory of strict liability, but instead alleges that Nike's representations "are intentionally and/or recklessly misleading and deceptive and/or were negligently made." Complaint ¶30.

refrained from some speech, but there is no evidence of this in the record and no court has made findings about this. Respondent had no opportunity to do discovery concerning whether Nike's allegations are true. In fact, this Court long has noted that commercial speech is unlikely to be chilled. In words that seem directly responsive to Nike's contention, this Court has observed: "Commercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979).

Third, California's law exists to protect consumers from exactly the harms alleged in Kasky's complaint: a company intentionally and recklessly making false statements out of a desire to increase its sales among consumers who care about the conditions under which the goods are produced.

B. Nike's Statements To Consumers About Its Products Are Commercial Speech

1. Under the governing *Bolger* test, Nike's speech is commercial speech

Nike contends that commercial speech is speech that does "no more than propose a commercial transaction" and that is "related solely to the economic interests of the speaker and its audience." Pet. Br. at 22. Nike's proposed approach would substantially narrow the current definition of commercial speech. It would jeopardize federal and state deceptive practices and false advertising laws by allowing companies to make intentionally false factual statements about their products with the goal of increasing sales.

Contrary to Petitioner's arguments, this Court has identified three characteristics that distinguish commercial from noncommercial speech: (1) whether the communication is an advertisement; (2) whether it concerns a product; and (3) whether the speaker has an economic motivation. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983). In addition, this Court has explicitly held that the fact that the speech concerns public issues is not sufficient to take it out of the realm of commercial speech for to do so would enable a company "to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68 (citation omitted).

All three elements of the *Bolger* test are met here. First, many of Nike's statements which formed the basis for Kasky's complaint were in the form of paid advertisements. Nike "took out full-page advertisements in major U.S. newspapers (*New York Times*, *Washington Post*, *U.S.A. Today*, *San Francisco Chronicle*)." Compl. ¶56. The rest of Nike's statements, although not in the form of paid advertisements, were part of a public relations campaign designed to sell products.[2] Nike was not opining on the desirability of sweatshops as a form of economic development in Southeast Asia, or even generally on whether its practices were good or bad for its workers or the countries in which they live. Rather, it made factual statements

[2] As discussed below, the form of the communication should not be determinative of whether it is commercial speech. If Nike sent letters to university presidents and athletic directors inaccurately describing the price of its products or falsely describing their quality, there would be no dispute as to whether those letters constituted commercial speech, even though not in the traditional form of a paid advertisement.

about its practices to actual and prospective consumers for the purpose of selling Nike's products.

The second element of the *Bolger* test is thus likewise met: the statements were about its products and how they were produced. Nike's statements were not about general working conditions in the apparel industry; the statements were specifically about the conditions under which Nike products are made.

Third, Nike indisputably had an economic motivation. Nike made the factual statements about its labor practices with the objective of persuading consumers to buy its products. College presidents and athletic directors are no doubt an important part of Nike's business. Letters to them, and paid advertisements in newspapers, stating that the products were produced under safe and lawful conditions, were not about debating globalization; they plainly were aimed to ensure continued sales.

2. Nike's statements were not mere expressions of opinion on matters of public concern; they were factual statements intended to sell products

As this Court powerfully observed: "Under the First Amendment there is no such thing as a false idea. However pernicious an idea may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *But there is no constitutional value in false statements of fact.*" *Gertz v. Welch,* 418 U.S. 323, 339-40 (1974) (emphasis added). Nike's statements at issue in this case were not expressions of opinion about the desirability of using sweatshops or of globalization. Rather, the entire focus of Kasky's complaint is on

the false *factual* statements made by Nike in an effort to increase sales of is products. Nike's speech was not political speech intended to influence public policy; it was commercial speech intended to influence consumers' decisions.

Nike was not speaking generally about labor practices in Southeast Asia, or about the effect of globalization on Third World economic development. As the California Supreme Court recognized, if Nike's ads and letters defended globalization generally, or argued that its practices were beneficial to the workers in Asia, its speech would be protected. Thus, Nike is wrong to state that California law prohibits it from speaking out "on nearly *every* public issue – from a company's diversity policy to its community relations efforts to its political activities." (Pet. Br. at 27). It can offer its positions on public issues freely. But Nike's speech was not a general opinion about an issue of public interest; it was speaking about the specific practices under which its *own products* are made.

All agree that when it comes to commercial speech "it is the interest of the listener that is paramount, rather than that of the speaker." ACLU Br. at 7. Consumers have a variety of concerns when they buy products, and concerns about the conditions under which products are made are entitled to no less protection than concerns about price. Nike dismisses some consumer concerns as mere "moral judgments that only indirectly affect consumer behavior" (Pet. Br. at 19) or that "affect[] purchasing choices only secondarily, if at all." (Pet Br. at 36). It asserts that those concerns bear "only a tangential relation to commercial transactions" (Pet. Br. at 26). The ACLU labels the concerns as merely "political," though it concedes that such concerns may indeed affect consumer behavior

(ACLU Br. at 4), and would limit false advertising laws to statements about price, safety, quality, or the "essential purpose or function" of a product (ACLU Br. at 13; Pet Br. at 35.) Nike and the ACLU are wrong as a matter of fact and as a matter of First Amendment law.

As the Solicitor General notes, the concerns of consumers cannot be so easily dismissed. (U.S. Br. at 35-36). For instance, Jewish consumers who observe kosher dietary laws may care more about the conditions under which food products are made (i.e., under rabbinic supervision, or not involving work on Saturdays) than about price. Their "moral" concerns about products likely have a greater and more direct impact on their buying than so-called "economic" concerns. Yet, false assertions about whether a product is kosher – whether on the product label, in paid advertising, in letters to consumers, or even in newspapers – would, under Nike's test, be beyond the reach of state false advertising laws. Similarly, false assertions by a company about whether its products are produced without pesticides or in other environmentally sustainable methods would be beyond regulation, even though many consumers prioritize whether a product is organic over its price. Many consumers would pay more for tuna caught in a dolphin-safe manner, or for cosmetics produced without animal testing, or for goods made in the United States, or for sneakers made in humane working conditions. Nike and its *amici* are wrong in assuming that these concerns are less important to consumers than other aspects of a product and its price.

The efforts of Nike and its *amicus*, the ACLU, to distinguish statements about price, safety, or "the essential functions" of a product are entirely subjective. Who is to say who decides what are the "essential" aspects of a

product? For some, dolphin-safe tuna may be more important than whether tuna is packed in water or oil. If an auto manufacturer publishes false statements about the injuries caused by its products to those in the car, is that entitled to less or more protection than statements about the injuries the product causes to others involved in the crash or to injuries caused to workers who manufacture them? Why should consumer concerns about the safety of products only to the consumer receive legal protection denied to those concerned about safety of products to others, to the environment, or to workers?

Nor can Nike justify the distinction by saying that harms to consumers concerned about anything other than price, quality, or safety are non-"commercial" and thus not within the legitimate scope of government regulation of commerce. (Pet. Br. at 35). Consumers who are misled about which companies to patronize suffer a commercial harm within the meaning of this Court's precedents. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 499 (1996) (plurality opinion) (interest of the government in protecting consumers in their spending decisions). Their motives for buying or eschewing products are irrelevant; false factual statements that might influence their buying are commercial harms, and they are well within the power of states to regulate.

Nothing but Nike's or the ACLU's own political preferences justifies treating consumers with humanitarian or environmental concerns with less solicitude and respect than consumers who count calories or pennies. As the Solicitor General notes, sellers should not be able fraudulently to command the premium prices that consumers will pay for environmentally friendly products any more

than sellers can command premium prices for false statements about quantity or quality. (U.S. Br. at 35-36).

The range of legitimate consumer concerns that may motivate buying is vast. Consumers who are concerned about the testing of products on animals, or about whether a product is organic, or about whether tuna is caught using dolphin-safe nets, or whether goods are made by union labor, would, under Nike's test, be unprotected. Some consumers may choose one brand of lemonade or pasta sauce over another based on the manufacturer's claim that it donates some percentage of the profits from the sale of its foods to charity. Others may care about the fuel efficiency of automobiles because of the expense, while some care because of their concerns about the environment or excessive dependence on foreign oil.

The heart of the distinction that Nike seeks to draw between "moral" or "political" concerns about products and "economic" ones is that all noneconomic concerns about products will be protected by the marketplace of ideas. (Pet. Br. at 34). That is simply not true. The commercial speech doctrine is premised on the Court's longstanding belief that the truth about a company's products and facilities will not emerge if the seller can lie about it. Consumers do not have access to the seller's facility and do not have the time to investigate the truth of the dozens or hundreds of claims they read or hear about products every day. While it is true that when the characteristics of some products become controversial – whether cigarettes cause cancer or SUVs pollute more than autos – it is more likely that the truth of some seller's claims may be tested. But, according to Nike's own admission, its products are made in 900 factories in 51 countries, making it impossible for consumers of Nike products to know what goes on there.

Moreover, there are dozens of companies that manufacture and sell athletic products and thousands that make and sell clothing generally. The fact that Nike's practices have received public attention should not allow it and all other clothing manufacturers blanket immunity from false advertising liability. This Court should not attempt to draw the line between commercial and noncommercial speech according to a subjective, ad hoc and changing assessment of which issues have sufficient political salience as to make consumer protection laws unnecessary.

Not only is Nike's effort to distinguish between commercial and political speech about products based on the preferences of consumers without support in law or logic, it would also be impossible to administer. If an auto manufacturer were to make false assertions in newspapers about the mileage of its SUVs, its speech would be commercial speech as regards consumers concerned only about fuel efficiency for cost reasons, but not as regards consumers concerned about fuel efficiency because of the effect on the environment or on American dependence on foreign oil. Statements to consumers who are allergic to pesticides could be regulated, but the same statement to those who avoid them because of the effect of pesticide spraying on agricultural workers could not. A false statement about whether there was meat within a product would be commercial speech if directed to consumers who avoid eating meat for health reasons, but not if it was directed to those who do so out of concern for the welfare of animals.

Nike argues further that false statements of fact about its factory conditions are constitutionally protected so long as they contain no reference to its specific products. (Pet. Br. at 24). This argument is mistaken because Nike's statements obviously concerned its products, even though

they did not single out any particular one. A cosmetics company that runs a series of advertisements claiming that all of its products are manufactured without animal testing surely is engaging in commercial speech even if it does not mention specific lipsticks or eye makeup that it sells.

Under the California Supreme Court's rule, companies remain free to speak out about the benefits of animal testing, the desirability of using pesticides, or any other issue. They simply cannot make false factual statements about their own practices. Under Nike's approach, Congress and the states would be powerless to prohibit intentionally false advertisements by a company about whether its products are made without use of testing on animals or without use of any pesticides. A restaurant could lie about whether its kitchen is kosher, so long as it did not mention any particular product.

The California Supreme Court decision, in stating that Nike's false factual assertions to consumers about the conditions under which Nike products are made may be actionable, fits squarely within this Court's commercial speech doctrine.

3. Whether speech is commercial speech is not determined by the format. Statements about a product by a manufacturer to prospective consumers are commercial speech even if they are not paid advertisements or on the product label, and do not concern the price, quantity or quality of the product.

If Nike put leaflets under the doors in college students' dorms concerning the price and characteristics of its

sneakers, no one would deny that this was commercial speech, even though it was not a paid advertisement. If Nike had written to college athletic directors and made false assertions that the stitching on its shoes was strong, its statements would indisputably be deemed commercial speech. If it sent letters to assure prospective consumers that its working conditions ensured high-quality products, its statements would be regarded as commercial. The reason is that the statements were to induce customers to buy its products. Nike's statements here are no different. As the Solicitor General argues, if a seller makes false statements about its environmental practices in an op-ed, "there is no reason those statements should be off-limits to a fraud action that otherwise meets the requirements of the common law." (U.S. Br. at 36 n.13).

While claiming that paid advertisements are in some cases political speech (Pet. Br. at 2, citing *New York Times v. Sullivan*, 376 U.S. 254 (1964)), Nike simultaneously seeks to prohibit any state regulation of false statements that are not "in the context of direct product advertising and product labels." (Pet. Br. at 36; *see also* Pet. Br. at 3 (noting that none of Nike's statements appeared in advertising)). Its effort to make First Amendment protection dependent upon the format of the speech has been rejected by this Court. *See, e.g., Central Hudson*, 447 U.S. at 564 (basing the degree of First Amendment protection on whether the communication is misleading and unrelated to illegal activity).

When Nike made factual statements about its practices in letters to college and university athletic directors – an important source of business for an athletic apparel company – unquestionably it intended to encourage them to buy Nike products. When Nike paid for advertisements

in newspapers, it was encouraging consumers to purchase its products.

Thus, the California Supreme Court correctly regarded Nike's speech as commercial. The test for commercial speech used by the California Supreme Court is completely consistent with this Court's decisions as well as with the underlying reasons why commercial speech is treated as a distinct category of expression under the First Amendment. First, commercial speech is by a person or entity, such as Nike, "engaged in commerce." Pet. App. 18a.

Second, the "intended audience [of commercial speech] is likely to be actual or potential buyers or customers of the speaker's goods or services, or persons acting for actual or potential buyers or customers." *Id.* at 21a. Nike's speech was directed at buyers of its products, including universities and individual consumers.

Third, "the factual content of the message should be commercial in character" in that "it is likely to influence consumers in their commercial decisions." *Id.* at 28a. Kasky's complaint is concerned with the false factual statements made by Nike; not its expression of political opinions. Nike's statements were commercial in that their sole purpose was to increase sales of its products.

4. Treating a manufacturer's factual statements about its products as commercial speech will not result in it receiving less protection than company critics; rather, to accept Nike's position would result in its receiving *greater* protection.

Nike and its *amici* argue that Nike's statements must be treated as noncommercial speech lest Nike critics

receive greater First Amendment protection for their criticism of the company's products than the company receives for its defense of its products. In fact, however, the opposite is true. To accept Nike's position will give it *greater* protection than those criticizing its practices.

If Nike's critics make false statements about it and its products, then Nike can bring a suit for defamation and product defamation. This Court has allowed corporations to sue for defamation to protect their business reputations. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-62 (1985). Tort law in every state permits corporations to bring actions for defamation and for product disparagement. Restatement (Second) of Torts §561 (1977); *El Meson Espanol v. NYM Corp.*, 521 F.2d 737, 739 (2d Cir. 1975); *Pullman Standard Car Manufacturing Co. v. Local Union No. 2928*, 152 F.2d 493, 495 (7th Cir. 1945). Whether Nike needs to prove actual malice or only negligence will depend on how corporations are characterized – as public or private figures, whether the statements are of public concern, and the scienter required in product disparagement cases. *See Gertz v. Robert Welch, Inc.*, 418 U.S. at 345-46 (describing standards of proof in defamation cases). But Nike undoubtedly may sue its critics who make false statements about Nike and its products.

By contending that its expression is political speech protected by the First Amendment, Nike implies that it cannot be held liable under the First Amendment even if its statements were intentional falsehoods because generally political speech is constitutionally protected so long as it does not constitute a tort such as defamation, false light, or fraud. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (holding that in order to recover for false light

invasion of privacy, plaintiff needed to prove that the defendant published its reports with knowledge of falsity or reckless disregard of the truth). If Nike's speech is regarded as political and as such is protected by the First Amendment despite its falsity, then Nike will have *greater* First Amendment protection than its critics. Nike's speech, unlike its critics', will not be covered by defamation law, and unless the Court creates a new First Amendment category that would allow prohibition of non-defamatory political speech, states would be powerless to regulate.

Further, although Nike argues that the truth about its products will emerge in the marketplace of ideas, Nike's critics are quite likely to be chilled by the threat of product defamation suits. Indeed, anti-sweatshops activists have been the subject of such defamation suits in California. *See, e.g., Fashion 21, Inc. v. The Garment Workers Center,* No. BC269427 (Superior Court, CA, filed March 6, 2002), appeal and petition for writ of mandate pending (Cal.App. Nos. B163114, B159788) (complaint for libel and unfair competition alleging anti-sweatshop activists defamed company by protesting wage and hour law violations in leaflets and at rallies and other organized protest activities). The California Supreme Court's decision thus provides a more level playing field than Nike and its *amicus* the AFL-CIO acknowledge.

At the conclusion of its brief, Nike argues that the "actual malice" standard should be applied in determining whether it can be held liable for false statements concerning the production of its goods. Pet. Br. at 43. As argued below, however, the issue of the scienter required in commercial speech cases is not properly presented in this case because it was not raised in or ruled on by the state courts in this case. In addition, Kasky's complaint alleges

intentional and reckless falsehoods by Nike. Complaint, ¶30. But if this Court were to accept Nike's suggestion to create a new First Amendment category where political speech could be the basis for liability upon proof of actual malice, then Nike's speech likely will be at least as protected as that of its critics, if not more so.

II. FALSE COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT

A. False Advertising Is Unprotected Under The First Amendment

This Court has held that "the State may ban commercial expression that is fraudulent or deceptive without further justification." *Edenfeld v. Fane*, 507 U.S. 761, 768 (1993) (citation omitted). Thus, it is firmly established that "[t]he states and the federal government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 638 (1985) (citation omitted). For commercial speech to come within First Amendment protection "it ... must ... not be misleading." *Cental Hudson*, 447 U.S. at 566.

Although this Court has recognized the need for some protection for false political expression, *New York Times v. Sullivan,* 376 U.S. 254, 271-72 (1964), it has expressly rejected such protection for false commercial speech. This Court explained in *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977): "[T]he leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." Commercial speech is protected so as to provide the consumers with important information; false commercial speech is unprotected because

it does not serve this interest. This Court explained: "[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection – its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 781 (1976).

B. The Issue Of Scienter Is Not Presented By This Case And The Complaint Is Sufficient To Meet Any Scienter Requirement

Nike argues that the California law imposes strict liability for false advertising and that instead "actual malice" is the appropriate standard for liability. Pet. Br. at 43. The issue of scienter, however, is not properly before this Court because it was not ruled on by the California Supreme Court. The California Supreme Court did not hold, as Nike implies, that there is strict liability for false advertising under the California Unfair Competition Law. California Business and Professional Code §§17200-17209. Quite the contrary, the California Supreme Court did not discuss the issue of scienter at all because its decision focused entirely on whether Nike's expression was commercial speech under the United States and California Constitutions. The issue of scienter was not raised by Nike in its brief in the California Supreme Court and hence may not be presented by Nike now.

Since the issue was not raised in or ruled on by the California Supreme Court, it is inappropriate for this Court to rule upon it. This Court has explained that "the appropriate relationship of this Court to the state courts" is a relationship of "peculiar force which should lead [this

Court] to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

This principle applies with particular importance where the issue concerns the interpretation of a state law. As this Court has explained, in the federal system "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statute may be construed in a way which saves their constitutionality." *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Thus, the interpretation of California's unfair competition law and false advertising laws, and what scienter requirement is found within them, is a matter that should be left to the California courts in the first instance, and thus should not be ruled on in this case.[3]

Second, ruling on the scienter issue is unnecessary because Kasky's complaint expressly alleges intentional and knowing false statements by Nike. Paragraph 30 of the First Amended Complaint states: "Nike has represented that its products are manufactured in compliance with applicable laws and regulations requiring wages and overtime. The representations are intentionally and/or recklessly misleading and deceptive and/or were negligently

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[3] Similarly, if this Court concludes that Nike's statements are not commercial speech, this Court should not reach the issue of the appropriate standard under the First Amendment for liability of such expression. This is an important issue of first impression – whether non-tortious political speech can be the basis for civil liability – and the question was not ruled upon by the California courts.

made." Indeed, the complaint alleges throughout that Nike intentionally and knowingly made false statements concerning the production of its products. For example, Paragraph 80 of the First Amended Complaint states that "Nike's misrepresentations were made with knowledge or with reckless disregard of the laws of California prohibiting false and misleading statements."

Because the California Supreme Court decided this case on a grant of a demurrer by the California Superior Court, all of the allegations of the complaint must be accepted as true. *See, e.g., Stevenson v. Superior Court,* 16 Cal.4th 880, 885, 66 Cal.Rptr.2d 888, 941 P.2d 1157 (1997) (allegations of complaint are accepted as true in considering a demurrer). Thus, at this stage in the proceedings, any First Amendment requirement for scienter has been met because the Complaint alleges knowing or reckless falsity. If liability is ultimately imposed on Nike on less than its asserted actual malice standard, then after there is a final judgment, Nike could raise that issue on appeal. But at this point the issue is premature because if Kasky proves actual malice at trial – that Nike knew its statements were false or acted with reckless disregard of the truth – then any ruling on whether a lesser standard is sufficient for First Amendment purposes would be unnecessary and an impermissible advisory opinion.

Finally, if this Court reaches the issue of scienter required for false commercial speech, it should hold that in this area liability can be based on intentional, reckless, or negligent false statements of fact intended to sell products to consumers. The government has a crucial interest in ensuring that commercial speech is accurate so that consumers can rely upon it. As this Court stated: "[T]he First Amendment . . . does not prohibit the State from

insuring that the stream of commercial information flow[s] cleanly as well as freely." *Virginia State Bd. of Pharmacy v. Va. Consumer Council,* 425 U.S. at 772. As discussed earlier, for precisely these reasons this Court has consistently held that false commercial speech is not protected by the First Amendment at all.

The actual malice standard urged by Nike, Pet. Br. at 43, would impose a very strict standard on government or private plaintiffs bringing actions for false commercial speech. In light of the crucial interest in preventing false commercial speech, a company should be required to exercise due care and thus should be potentially liable if its false statements were uttered intentionally, knowingly, recklessly, or negligently.

C. If Nike's Position Is Accepted, Consumer Protection And False Advertising Laws Nationwide Will Be In Jeopardy

Nike's position, if accepted by this Court, will put in jeopardy a vast array of federal, state, and local laws designed to protect consumers. For example, under the position taken by Nike and its *amici*, a company could not be sued for false advertising if it falsely posted "Going Out of Business Sale" signs to attract customers. Nike would view the sign as non-commercial speech because it is not about a specific product and is not about its essential characteristics. Yet, such false advertising clearly would run afoul of Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." Nike's position would make many, if not most, applications of this statute unconstitutional.

Indeed, Nike's position would make countless state and federal consumer protection laws unconstitutional. For example, California law prohibits false or misleading statements about whether products were made by blind workers (Cal. Bus. & Prof. Code, §17522 (2003)), American Indians (Cal. Bus. & Prof. Code, §17569 (2003)), or union labor (Cal. Labor Code, §1012 (2003)). Under the position taken by Nike and its *amici*, all of these laws would be unconstitutional because such claims, by their view, do not constitute commercial speech. Likewise, by Nike's argument, state laws designed to provide accurate information to consumers about environmental claims in advertisements are also unconstitutional. California, for example, enacted a statute providing: "It is unlawful for any person to make any untruthful, deceptive, or misleading environmental marketing claims, whether explicit or implied." Cal. Bus. & Prof. Code, §17850.5(2). But Nike and its *amici* would deny the government the power to ensure accurate statements by companies concerning the consequences of their actions for the environment.

Federal law makes it unlawful to disseminate false advertising by mail or other means that directly or indirectly induces consumers to purchase food, drugs, services, or cosmetics. 15 U.S.C. §52 (2003). Nike's position would make it unconstitutional to apply this law to false statements by companies concerning whether their food was organic or whether its drugs and cosmetics were tested in a "cruelty free" manner. Laws ensuring accurate food labels would become similarly vulnerable.

The list of laws endangered by Nike's position is endless. Countless consumer protection laws seek to provide prospective customers with accurate information about products. But Nike's approach would place many

claims beyond the reach of government regulation and, in fact, would immunize the speakers from liability.

III. ACCORDING TO NIKE AND ITS *AMICI*, KASKY HAS SUFFERED NO INJURY IN FACT AND THUS THIS COURT MUST DISMISS THE WRIT AS IMPROVIDENTLY GRANTED AS THERE IS NO ARTICLE III CASE OR CONTROVERSY

From the outset, Nike's brief stresses that Kasky has suffered no injury from Nike's false speech. Nike, for example, points out that Kasky "alleges no harm or damages whatsoever regarding himself." Pet. Br. at 5 (quoting First Amended Complaint §8). Nike repeatedly emphasizes that "Kasky . . . alleges no injury," Pet. Br. at 45, and that it is a suit by a "person who concedes that he was entirely unaffected by those statements." Pet. Br. at 47.

This Court, of course, has repeatedly held that no federal court may hear a case unless the plaintiff has personally suffered an injury because "injury in fact" is the "irreducible constitutional minimum of standing." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). This Court has explained that "[t]he plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-102 (1983) (citation omitted). Because "injury in fact" is mandated by Article III, it is a prerequisite to jurisdiction in this Court, as much as in the lower federal courts.

This Court has held that it may hear cases in which the plaintiff does not meet Article III's standing requirement if a state court judgment imposes harms on the defendant. In *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 623 (1989), this Court explained: "When a state court has issued a judgment in a case where the plaintiffs in the original [state court] action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties [defendants in the state court action] who petition for our review, where the requisites of a case or controversy are also met."

ASARCO applies when a state court "has issued a judgment." There is no judgment in this case because the California Supreme Court was considering whether the trial court properly granted Nike's demurrer. Nor has the state court caused "direct, specific, and concrete injury." As discussed above, Nike's claims that its speech has been chilled has no support in the record of this case. Moreover, this Court has stated that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

In *ASARCO*, if this Court had denied review, the petitioners would have had "to commence a new action in federal court to vindicate their rights under federal law," an action which would have been "at the cost of much disrespect to state-court proceedings and judgments." 490 U.S. at 623. In contrast, Nike can seek review in this Court if a judgment is entered against it and upheld in the California appellate courts.

Because, as Nike repeatedly argues, Kasky has suffered no injury cognizable under Article III, this Court lacks jurisdiction and should dismiss the writ as having been improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 4 2003
CLERK

No. 02-575

IN THE

Supreme Court of the United States

NIKE INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ of Certiorari to the Supreme Court of California

BRIEF OF DOMINI SOCIAL INVESTMENTS LLC, KLD RESEARCH & ANALYTICS, INC., AND HARRINGTON INVESTMENTS, INC., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICI CURIAE*[1]

Domini Social Investments LLC is an investment adviser registered with the Securities and Exchange Commission ("SEC") under the Investment Company Act of 1940, specializing exclusively in socially responsible investing ("SRI"). Domini manages more than $1.3 billion in assets for individual and institutional mutual fund investors who integrate social, environmental, and financial criteria into their investment decisions. KLD Research & Analytics, Inc. ("KLD") is a leading provider of social research for institutional investors, serving clients who wish to integrate social and environmental criteria into their investment decisions. KLD provides performance benchmarks, corporate accountability research, and consulting services.

Harrington Investments, Inc. ("HII"), based in Napa, California, is a registered investment advisor, managing assets for individual and institutional clients using comprehensive social, environmental and financial criteria.

SUMMARY OF ARGUMENT

The principal difference between political and commercial speech is the role of the government in ensuring accuracy. While government has no role to play in winnowing false from true political ideas, it has a role to play in ensuring that facts of commercial significance are accurate. This role derives directly from the reason commercial speech is given constitutional protection, which is to inform consumers and promote market efficiency.

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[1] Consents to the filing of any and all briefs *amicus curiae* have been granted by counsel for Petitioners and Respondent, as indicated on the U.S. Supreme Court docket. Pursuant to Rule 37.6, counsel for *amici* state that this brief was authored by the professors of law or political science and counsel listed on the front cover hereto, and was not authored by counsel for any party. No one other than *amici,* and the authors, made a monetary contribution to the preparation of this brief.

Consumers and investors are increasingly taking social and environmental facts into account in their purchasing and investment decisions, and thus these facts are properly understood as commercial speech. The goal of encouraging accurate corporate disclosure is best achieved by ensuring that the States and the federal government maintain the power to regulate the type of speech at issue here: factual representations by a commercial entity about that company's operations and products to an audience of potential consumers. The test the California Supreme Court articulated allows a proper role for government, recognizing that promoting accurate consumer information is the core value to be advanced by the commercial speech doctrine and is a necessary condition for the functioning of a free-market economy.

In contrast, Petitioner's expansive view of political speech, encompassing factual statements by any entity, including a commercial entity, about its operations related to a matter of public concern, not only threatens important consumer protection values, but could have serious unintended consequences for regulation of the capital markets. Securities regulation in the United States is premised upon compelled disclosure of specified information in connection with specified types of transactions. This Court has struck down compelled disclosure of political speech, however. The securities laws also contain numerous causes of action for false and misleading statements of fact that could be undermined if Petitioner's expansive view pre-vails. Finally, shareholders' power to continue to bring important matters to the attention of other shareholders through the shareholder proxy resolution process would be uncertain on a broad reading of corporate political speech, undermining an important avenue of corporate accountability.

ARGUMENT

I. THE TEST THAT THE CALIFORNIA SUPREME COURT ARTICULATED FOR DEFINING COMMERCIAL SPEECH IS CONSISTENT WITH THE REASONS FOR REGULATING COMMERCIAL SPEECH AND PROVIDES AN ADMINISTRABLE BASIS FOR DISTINGUISHING COMMERCIAL FROM NON-COMMERCIAL SPEECH

The principal difference between the First Amendment protection given to political versus commercial speech is the role of the government in ensuring accuracy. In the realm of political speech, this Court has clearly recognized that there is no role for the government to identify some political ideas as "false" or to create causes of action to allow some ideas to be penalized. *See National Socialist Party v. Skokie*, 432 U.S. 43 (1977). Rather, the political realm depends on competition among ideas to allow some ideas to flourish and some to fail.

In contrast, in the realm of commercial speech, there is a role for government, and that role is to promote the dissemination of accurate facts. *See Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). This role derives directly from the reason that commercial speech has been given First Amendment protection, which is to "assure the flow of accurate information to consumers necessary to the functioning of efficient markets." *See* Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U.L.J. 789, 802 (1998). As this Court stated in first recognizing the constitutional import of commercial information:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that

> those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 765 (1976).

While "the free flow of commercial information is indispensable" to the proper functioning of the market, *see id.* at 765, that information must be accurate or resources will be allocated improperly, and individuals' expressions of their actual consumer preferences will be thwarted. So, for instance, assume that a consumer would pay more money to fly on an airline that had top of the line maintenance procedures, or an investor would pay more money for the stock of an airline company that invested heavily in maintenance. If an airline can use its public statements—in advertising, in letters to the editors, in speeches or in quarterly or annual reports under the securities laws—to promote itself as investing in maintenance, both consumers and investors are harmed if those representations of fact are false or misleading. Companies that actually do invest more heavily in airline maintenance may not be able effectively to compete on price, if consumers direct their dollars to the "falsely safe" but potentially cheaper airline, thus degrading the "market in airline safety." Investors are harmed by paying a "safety premium" in the stock price that turns out to be fraudulent. Given the role of accurate information in a free-market economy, there "is no constitutional value in false statements of fact." *Gertz v. Welch*, 418 U.S. 323, 339-40 (1974). And, given the role of accurate information in a free-market economy, as a society we permit more regulation of speech related to commercial and securities transactions than in other areas such as elections, the press or religion. *See* Neuborne, *supra* at 801-802.

This case presents the Court with the opportunity to permit the market in corporate social responsibility to continue to develop, by ensuring that consumers and investors who take

social, economic and environmental facts into consideration in their purchasing and investing decisions are well-informed, and cannot be lied to with impunity, or have the facts misrepresented or presented in confusing or misleading fashion. That there are such consumers and investors, and that their numbers are growing, is undeniable. In 1994, an article in The Economist branded this "the era of the corporate image," in which "consumers will increasingly make purchases on the basis of a firm's role in society: how it treats its employees, shareholders, and local neighbourhoods." *Brand New Day*, THE ECONOMIST, June 19, 1994, at 71-72. The kinds of questions Nike faced in 1996 and 1997, leading to this lawsuit, are evidence of concerns by some consumers about how companies' goods are being produced, what the environmental implications are of production, and how the people producing them are being treated, here and around the world. *See* Geoffrey Heal, *Mastering Investment: The Bottom Line to a Social Conscience*, FINANCIAL TIMES, July 2, 2001 (stating that consumers are using their buying power to attain social goals, and that the "concerned consumer" movement "is particularly influential in the human rights and environmental fields, where major clothing and shoe brands, Nike prominent among them, have been boycotted for their use of sweatshop labour . . .").

Academic research confirms a trend among some consumers to make their product choices not simply on their evaluation of the attributes of the products, but on their evaluation of a company's "corporate social responsibility" as well. *See* Sankar Sen and C.B. Bhattacharya, *Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility*, JOURNAL OF MARKETING RESEARCH 225 (Spring 2001). Given this trend, in 1993 companies spent over $1 billion on cause-related marketing, such as marketing that focuses on environmental friendliness, or a commitment to diversity in hiring and promoting, an increase of 150% over cause-related marketing in 1990. *See*

Tom J. Brown and Peter A. Dacin, *The Company and the Product: Corporate Associations and Consumer Product Responses*, 61 JOURNAL OF MARKETING 68 (Winter 1997).

Investors as well use companies' public statements about their social and environmental records to make decisions to buy or sell stocks. The growth of SRI–defined as the integration of social and environmental criteria into the investment decision-making process—has been dramatic over the past few years. By 2001, total assets under professional management in portfolios screened for one or more social issues had risen to $2.01 trillion. Social Investment Forum, *2001 Report on Socially Responsible Investing Trends in the United States*, November 28, 2001, available at http://www.socialinvest.org. Between 1999 and 2001, total professionally managed investment assets grew by 22 percent, while SRI investment assets grew by 35 percent. *See id.* And investors as well as consumers reacted specifically to allegations that Nike's products were being produced in "sweatshop" labor conditions. For instance, given these allegations, and upon investigation, KLD removed Nike in 1997 from the Domini 400 Social Index (an index of 400 firms meant to reflect the large-capitalization socially responsible domestic market).

In its market activities, Nike clearly recognized the commercial import of facts about whether it used "sweatshop labor" or not—the type of facts at issue in this case. Nike's CEO Phil Knight was quoted in 1998 saying that "I truly believe the American consumer doesn't want to buy products made under abusive conditions." *See* Bill Richards, *Nike to Increase Minimum Age in Asia for New Hirings, Improve Air Quality,* WALL ST. J., JAN. 15, 1998, at B10. Mr. Knight attributed concerns about alleged sweatshop labor as a partial reason for Nike's disappointing financial results in 1997 and 1998. *See* Philip H. Knight, Cover Letter to Annual Report to the Shareholders, 1998, available at www.sec.gov (attributing financial results to "Asia, brown shoes, labor practices, resignations, layoffs and boring ads").

Of course Nike or any other company must be able to respond to criticisms of their labor policies by providing facts about those policies in order to reassure concerned consumers and socially responsible investors. Yet that reassurance needs to be based on truthful, accurate and non-misleading information. Nike or any other company should not be able to "plead the First" so that the truth of the facts they assert about their social and environmental records cannot be tested in litigation—just as they would not be able to plead the First to preclude an examination of their statements of fact about their financial results of operations or about product quality, price or safety.

The goal of encouraging accurate corporate disclosure is best achieved by ensuring that the States and the federal government maintain the power to "insur[e] that the stream of commercial information flow[s] cleanly, as well as freely," *Virginia Pharmacy Board*, 425 U.S. at 772, by permitting causes of action for untrue, deceptive or materially misleading statements of fact. *See id.* (recognizing the importance of state consumer protection actions). The test the California Supreme Court articulated does just that, recognizing that promoting accurate consumer information is the core value to be advanced by the commercial speech doctrine and is a necessary condition for the proper functioning of a free-market economy.

A. When a Commercial Entity States Facts About Its Own Products or Operations, in Order to Influence Purchasing Decisions About Either the Product or the Company's Stock, That Is and Should Be Understood to Be Commercial Speech

The California Supreme Court's analysis of commercial speech emphasizes a number of important factors to

distinguish commercial from non-commercial speech. The California Supreme Court emphasized (1) the identity of the speaker; (2) the identity of the audience; and (3) the content of the speech as "factual representations about the business operations, products, or services of the speaker." *Kasky v. Nike, Inc.*, 45 P.3d 243, 256 (2002). *Amici* view these factors as a logical synthesis of this Court's guidance on the distinction between commercial and non-commercial speech, and views them as providing administrable guidance for the courts in future cases.

First, in order to be commercial speech, the statements must be made by a commercial entity, that is, an entity in the business of selling either products or services. This would seem to be a necessary condition for speech to be commercial, and wholly unexceptional. Second, the California Supreme Court suggested that commercial speech "generally or typically is directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker." *Kasky*, 45 P.2d at 256. Focusing only on the intended audience may create some conceptual difficulties with this aspect of the Court's analysis, since speech communicated to one audience (to Congress, for instance) will likely be reported to other audiences, including potential consumers and investors. The California Supreme Court may have been closer to the mark in looking at the company's reason for speaking in analyzing the "audience" factors, suggesting that this factor relates to the company's ultimate economic motivation for making statements about its products or services. *See id., citing Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983). As Nike concedes, however, "virtually *everything* a company does is ultimately intended to improve its financial bottom line." *See* Brief for the Petitioners ("Pet. Br.") at 22 (emphasis in original). Thus, it may be that the "intended audience/economic motivation" factor is most useful to exclude certain types of speech from consideration as commercial speech (such as speech directly to regulators).

The third factor, however, in conjunction with the first and second, really specifies what is and is not commercial speech, in *amici*'s view, that is "representations of fact about the business operations, products, or services of the speaker." *Kasky*, 45 P.2d at 256. First, facts about a company's own operations can fairly readily be distinguished from the company's general political views and opinions. If Nike states that "globalization is a good thing that brings excellent benefits to the people in developing countries," that is Nike's political opinion, not a representation of fact about Nike's own operations. When, in contrast, Nike states that "Nike pays the minimum wage in every country in which it operates," that is a statement of fact about Nike's own operations which should properly be understood as commercial speech. It is these facts about a company's social, economic and environmental records that are animating concerned consumers and SRI investors to enter into commercial transactions with a company, or not, and thus it is the truth of these factual assertions that must be protected in the market.

In response, Nike makes a number of arguments. First, Nike broadly argues that the government has no legitimate role in protecting the accuracy of social facts, even if they do inform purchases by concerned consumers and investors, since these consumers are "purchas[ing] (or boycott[ing]) goods for *non*-economic reasons." Pet. Br. at 22 (emphasis in original). But that is precisely the point. People are using Nike's statements of fact about its labor practices in Asia to inform their commercial (purchasing) behavior. While Nike makes this statement in support of its general argument that this speech is unconnected to the regulation of commercial transactions, by its own admission there are consumers

buying or not buying goods for non-economic reasons.[2] Thus the states and federal government have a role to play to structure legal incentives so that those statements of fact about those non-economic reasons are as accurate as possible and not misleading.[3]

Second, Nike also argues that the only commercial facts that can be properly regulated in a consumer protection context are those that refer specifically to the product, such as its price, availability, or suitability. Pet. Br. at 24. Yet, this Court has long recognized that consumer protection laws are meant to address consumers' individual evaluations about what matters to them in a purchasing decision, and cannot be reduced only to a matter of the price and quality of goods. In

[2] Nike repeats the argument that regulating the truth of statements of fact about labor conditions is unconnected to the state's power to regulate commercial transactions because the information is affecting people's moral judgments first, and then their "purchasing choices only secondarily, if at all," Pet. Br. at 36, and again at page 46 (these "statements . . . affect consumer behavior only indirectly and only for a subset of listeners."). Nike evidently recognizes the importance of this argument to its conclusion that this is not commercial speech. And yet *amici* note that Nike provides no support for its statement that "[t]here is only the most attenuated link between public statements on important social, political, and moral issues—which generate heated responses and debate—and consumer purchasing decisions." Pet. Br. at 36. Nor could Nike support that blanket generalization, for it is clearly incorrect in today's market. *See supra* pages 5-6.

[3] To use Nike's term that these factors are "non-economic" is not to adopt an implication that they do not have "bottom line" consequences. All investors, and certainly SRI investors, make decisions based on intangible factors, such as the quality of management, the reputation of a company, and increasingly the corporate social responsibility reputation of a company. Domini and other social investors believe that careful attention to social factors can help identify companies with higher quality management, that can produce higher returns to investors. Again this points to the commercial importance of the kind of information at issue in this case.

Federal Trade Comm'n v. Algoma Lumber Co.,291 U.S. 67 (1934), this Court rejected an argument that a buyer of white pine was not prejudiced by being supplied with yellow pine, even if the quality of the two goods was the same (which the evidence in that case had not demonstrated), and even if the buyer might have saved money:

> The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.

Algoma Lumber, 291 U.S. at 78. If concerned consumers are purchasing Nike shoes based on Nike's representations of fact about labor conditions in its factories because consumers prefer to buy goods made in humane conditions–even if those consumer preferences are "dictated by caprice or by fashion or perhaps by ignorance"—then the seller's statements of fact about the conditions of production matter in that commercial transaction, and their accuracy can properly be regulated.

Third, Nike suggests that the "line between fact and opinion is so hazy" that companies in Nike's position would have little guidance about what they could and couldn't say without fear of potential deceptive business practices claims. Pet. Br. at 32. While it is true that this Court has recognized that in some instances distinguishing between a fact and an opinion can be analytically difficult, *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988), this distinction is used regularly, including by this Court. *See Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Moreover, the category "facts" here is limited to facts about Nike's own products and services. And even if the great number of facts associated with the global scope of Nike's business makes it costly for Nike to speak with confidence

about the facts, that cost should be viewed as a normal business expense, perhaps increasing as business becomes more global, rather than as an inherently unfair burden. *Amici* notes that Nike has not argued that it is difficult to say whether the statements at issue in this case are facts or opinions, rather that as a general matter the distinction does not give enough guidance. Presumably if it was difficult to separate facts from opinions in this case, Nike would have so stated. The law can never be reduced to mechanistic, mathematical precepts, and so there will always be areas of discretion and dispute. But in the vast majority of cases the line between "facts about a company's own operations" and "opinions about general political and social issues" will provide workable guidance for companies and courts.

Finally, Nike argues that since opinions are informed by facts, and since it won't be able to discuss the facts of its own operations without fear of litigation, it will be disabled from shaping public opinion and participating in political debate. Pet. Br. at 32-33. Yet, Nike is in a good position to judge the limits of its speakers' knowledge of its global operations, and thus to express whatever qualifications are necessary in order to make statements of fact about its own operations not misleading as it participates in shaping public opinion and participating in political debate. As a public company, Nike is already under obligations imposed by the securities laws to ensure that all of its public statements are accurate, do not contain material misstatements of fact nor material omissions, and so are not misleading. *See infra*, pages 22-27. The heart of the issue, *amici* suggest, is not whether Nike will be inhibited in stating facts about its operations if the California Supreme Court ruling is upheld, but rather that Nike will be inhibited in *misstating* the facts if the California Supreme Court ruling is upheld.

In short, *amici* respectfully submit that the California Supreme Court has articulated an administrable synthesis of this Court's holdings to develop a process of analysis for

distinguishing commercial from non-commercial speech, and that such a process rightfully emphasizes the nature of the speaker as a commercial entity; the nature of the potential audience of consumers (and we would add, investors) and the company's economic motivation for speaking; and the content of the speech at issue being statements of fact about the company's own operations, products or services.

II. GRANTING FULL FIRST AMENDMENT PROTECTION TO COMMERCIAL SPEECH WOULD UNDERCUT ESSENTIAL DISCLOSURE AND REPORTING OBLIGATIONS UNDER THE SECURITIES ACT, THE EXCHANGE ACT AND VARIOUS SEC RULES AND REGULATIONS.

Nike's position in this litigation, if upheld, not only threatens important consumer protection values, but threatens to undermine capital market regulation as well. Nike apparently glimpses some of the implications of its arguments for securities regulation, and therefore suggests in a footnote that in "contrast [to state consumer protection legislation], government may have a freer hand in regulating financial statements that are immediately incorporated by financial markets into stock prices." Pet. Br. at 34, n.9. And yet, by what analytic principle would government have that freer hand if what is being developed is a constitutional limit on government's power? The essence of Nike's argument is that government may not regulate companies' statements of fact about their own operations where those facts touch on matters of "public concern," except by showing the statements were made with actual malice. Pet. Br. at 43 (stating that "[w]hen even purely commercial speech is thus 'inextricably intertwined' with noncommercial speech on matters of public concern, 'the entirety' of the speech must 'be classified as noncommercial,' *quoting Board of Trustees v. Fox*, 492 U.S. 469, 474 (1989)). What are the implications on securities regula-

tion, through, of treating any speech on a matter of "public concern" as political speech, subject to the strictest constitutional scrutiny? The federal securities laws reach much further than "financial statements that are immediately incorporated by financial markets into stock prices," and touch on many matters of public concern. Indeed, given recent events, that financial statements are accurate is itself a matter of public concern, suggesting that on Nike's theory even statements of fact about a company's financial results would not be commercial speech. As the following discussion indicates, there are quite serious implications from Nike's position for securities market regulation, deserving much more thought than treatment in a footnote would suggest.

A. Affording Full First Amendment Protection to Any Corporate Speech that Touches on a "Public Concern" Could Cast Into Constitutional Doubt the Structure of Compelled Securities Disclosure

The core regulatory approach taken in the federal securities laws is compelled disclosure of specified information at specified times: when a company is newly issuing securities (stocks or bonds); in quarterly and annual reports; in proxy statements in conjunction with the company's annual meeting; and in proxy statements or tender offer disclosure in conjunction with extraordinary transactions such as mergers, acquisitions or tender offers. *See* Securities Act of 1933, §§ 5, 7, 10, Schedules A & B, 15 U.S.C. §§ 77e, 77j, 77aa (1994); Securities Exchange Act of 1934, §§ 12(b)(1), 12(g)(1), 13, 14, 15, 15 U.S.C. §§ 78*l*(b)(1), 78*l*(g)(1), 78(m), 78(n), 78(o) (1994). The instructions for developing each of the various types of disclosure documents are incorporated in one omnibus regulation, Regulation S-K ("Reg. S-K"), which specifies precisely what information needs to be disclosed in each type of disclosure document and in what format. *See* Reg. S-K, 17 C.F.R. §§ 229.10-229.702 (1998).

Nike's footnote suggestion that the Court can adopt its expansive view of non-commercial speech (corporate statements touching on an issue of "public conern," Pet. Br. at 43), without affecting securities regulation apparently rests on the misconception that the only compelled disclosure under the federal securities laws is of financial statements. *See* Pet. Br. at 34, n. 9. This is a serious misconception, since under Reg. S-K both quantitative (financial) and qualitative information is required to be disclosed. For example, the issuer must disclose general information about its business; the competitive risks facing the business; legal proceedings involving the company, with specific attention to environmental proceedings; the experience and background of management and potential conflicts of interest; the structure of the board of directors; and so forth. *See* Reg. S-K, Item 101, 17 C.F.R. § 229.101 (1998) (description of business); *id.*, § 229.103 (legal proceedings); *id.*, §§ 229.401-405 (information on directors and management, including executive compensation and conflicts of interest).

Moreover, even when disclosing quantitative information, issuers are now required to provide a narrative analysis of their financial results, including a discussion of trends, future risks, or contingencies that might affect those results (called "Management's Discussion and Analysis", or "MD&A"). *See id.*, § 229.303. The Sarbanes-Oxley Act of 2002 added yet another layer of qualitative disclosure, including, among other items, disclosure concerning a company's code of ethics. *See* Sarbanes-Oxley Act of 2002, § 406 (2002).

In the subsequent sections of this Brief, we develop some specific concerns about the implications of Nike's argument on specific aspects of Reg. S-K. And yet there is a general concern as well: if the Court defines any corporate speech on a matter of "public concern" as non-commercial speech, can the SEC still compel disclosure of that speech? The Court's cases in the charitable solicitation area suggest not (or at least

not without litigation over any contested disclosure item). In those cases, compelled disclosure of the percentage of funds reaching a charity/beneficiary has been found unconstitutional, given that charitable solicitations are fully protected speech. *See Riley v. National Federation of the Blind*, 487 U.S. 781, 799 (1988). Moreover, this Court's holding in *Pacific Gas and Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1985) also suggests not. In that case a plurality of this Court struck down an order by the Public Utility Commission of California that had required the utility, PG&E, to include customers' statements about rates four times a year in PG&E's mailings. *Id.* at 7. This Court's holding was based, in significant part, on the view that the government's authority to compel non-commercial speech is limited. *See id.* at 16-19.

And yet, looking at the categories of qualitative information that the SEC currently requires, *supra*, these are all matters of "public concern," and thus not commercial speech according to Nike's definition. *See* Pet. Br. at 43. In light of the difficulties in the capital markets over the last year, as affected by problems at Enron, WorldCom, Tyco, Xerox, and HealthSouth, even such bedrock corporate governance issues as accounting practices, executive compensation, and accounting for stock options are clearly matters of serious "public concern," and are currently matters of intense public debate. Information about each of these items is required to be disclosed under Reg. S-K. *See* Reg. S-K, items 401-405, 17 C.F.R. §§ 229.401-405 (1998). Is each of these compelled disclosure items now constitutionally suspect, under Nike's theory, because it is a matter of public concern and thus not commercial speech? Is each now subject to challenge in litigation as an impermissible content-based regulation that is not narrowly tailored? Given *Riley* and *Pacific Gas & Electric Co.*, *amici* believes that a broad ruling by this Court adopting Nike's theory of non-commercial speech could have serious implications for the SEC's power to require

companies to provide information to the capital markets, at a time when restoring investor confidence in the accuracy of information in the markets is critical.

It is possible that access to the securities markets would be held to be analogous to access to federal broadcast licenses, in which case the government has been found to have broader powers to compel speech as a condition of access. *See Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994) ("must carry provisions" served important government interests by preserving free broadcast television, ensuring widespread dissemination of information and promoting fair competition). Moreover, following a discussion of the commercial speech doctrine, a plurality of this Court has pointed to securities regulation as "another area" of permissible regulation of speech. *See Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 n.5 (1985). The suggestion in *Dun & Bradstreet* that the regulation of speech in the securities field was distinct from the regulation of commercial speech generally was explicitly adopted by the Court of Appeals for the District of Columbia Circuit in *Securities and Exchange Comm'n v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365, 372 (D.C. Cir. 1988). So compelled disclosure under the securities laws of specific information of "public concern" might not clearly be constitutionally impermissible if Nike's views prevail. And yet the commercial speech doctrine generally suggests that some areas of speech can be extensively regulated precisely because that speech is understood as tied to the underlying commercial transactions (here buying and selling securities or communicating with shareholders), and thus is commercial speech. If the "anchor" of commercial speech is cut loose, the source of continuing regulatory authority would also be set adrift. Thus, while securities regulation is not directly before the Court, *amici* respectfully submit that the potential unintended capital market consequences of a broad ruling in Nike's favor must be considered carefully.

B. Granting First Amendment Protection to Corporate Speech Would Make Many Important Disclosure Obligations Involving Political Matters Inherently Unreliable

Item 101 of Regulation S-K requires that companies provide in various periodic reports and offering documents a detailed discussion of the general business of the company. In addition to a general narrative description of the "business done and intended to be done" by the company, Item 101 requires disclosure of material portions of the business that might be affected by government contracts, "positive and negative factors pertaining to the competitive position" of the business and material effects resulting from compliance with Federal, State and local environmental laws. *See* 17 C.F.R. § 229.101(c)(1)(i), (vii), (ix), (x), (xii).

The potential—if not inherent—political nature of some of those items, however, makes the content of those disclosures far too vulnerable to corporate manipulation and deception, at least if corporate speech were afforded full First Amendment protection. For instance, even though compliance with environmental laws in the U.S. might have a material adverse effect on Nike's expenditures and earnings, Nike might color its statement with a political judgment about those environmental laws that could reverse the substantive impact of the disclosure itself. Thus, implicitly embracing a position that most current U.S. environmental laws violate some unspecified Constitutional mandates, Nike might state, "Nike's expends only minimal resources in complying with U.S. environmental laws that do not run afoul of the Constitution." To the extent that statement remains inextricably linked to a political comment, under Petitioner's reading of the First Amendment, Nike's disclosure would receive full protection regardless of its (intentionally) deceptive nature. And what if companies simply refuse to comment on their use of child labor, or toxic releases, or whether they have Superfund sites, or even whether they expense stock options? Could they be compelled to, if they claim that compelled disclosure of "non-commercial" information is unconstitutional?

As investors learn that these particularly vulnerable disclosure categories almost beg for manipulation due to the political nature of the subject matter addressed, investors may simply discount or ignore company responses on those matters altogether. In addition, this would remove the market advantage that corporations with exemplary social or environmental records should enjoy. *See* Joseph A. Franco, *Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Disclosure*, 2002 COLUM. BUS. L. REV. 223, 258 (". . . .[O]pportunistic issuers adversely affect economic efficiency by devaluing the disclosure of issuers generally, and in particular the disclosure of candid issuers."). The problem raised here addresses something more than the lack of a viable action for fraud based on material misstatements or omissions. Instead, the problem focuses on the futility of even asking companies to answer questions involving inherently political matters, matters of "public concern," if full First Amendment protection applies. In the end, despite a continuing need for full and fair disclosure regarding certain potentially or inherently political matters, granting First Amendment protection to corporate speech would render unreliable many important disclosure requirements that are necessary for investors to make informed choices.

C. Using the First Amendment to Create a "Super Safe Harbor" for Forward Looking Statements Would Undermine the Usefulness of Management's Discussion and Analysis.

Item 303 of Regulation S-K sets forth the detailed disclosure requirements relating to management's discussion and analysis of current operations and plans for the future.

See 17 C.F.R. § 230.303. MD&A disclosures are required for quarterly and annual reports for reporting companies as well as for prospectuses related to various securities offerings. According to the SEC, the detailed discussion is intended to provide "in one section of a filing, material historical and prospective textual disclosure enabling investors and other users to assess the financial condition and results of operations of the registrant, with particular emphasis on the registrant's prospects for the future." *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, Sec. Act. Rel. No. 33-6835, 1989 WL 258977 (SEC May 18, 1989). To that end, the MD&A must include a disclosure of trends and uncertainties likely to have a material negative effect on the company in addition to positive trends that management foresees. *Id.*

While liability might arise for material false or misleading statements and omissions under Rule 10b-5 or Sections 11 and 12 of the Securities Act when companies discuss these trends and uncertainties, *see e.g. Wallace v. Systems & Computer Tech. Corp.*, 1997 WL 602808, Fed. Sec. L. Rep. (CCH) ¶99,578 (E.D. Pa. 1997)(failure to comply with Item 303 of Regulation S-K can amount to a Rule 10b-5 violation), various "safe harbor" provisions exist that, under certain conditions, insulate companies from liability based on "forward looking statements" or projections. *See* Securities Act Rule 175; Exchange Act Rule 3b-6. For example, Exchange Act Rule 175 and Securities Act Rule 3b-6 shield certain forward looking statements from liability, unless those statements were not made in "good faith" and "with a reasonable basis." 17 C.F.R. §§ 230.175, 240.3b-6. Exchange Act Section 21 E, though unavailable in the context of an initial public offering, goes even further and provides a safe harbor for any forward looking statements accompanied by "meaningful cautionary statements" that identify important factors potentially affecting management's predictions or forecasts. *See Ehlert v. Singer*, 245 F.3d 1313 (11th Cir.

2001). Even if no cautionary language were used, however, Section 21E provides that liability based on forward looking statements will only result if the statements were made with "actual knowledge" that the statements were false or misleading.

Extending broad First Amendment protection to corporate speech, however, would create a "Super Safe Harbor." Through the "meaningful cautionary statements" mechanism, "good faith" or "rational basis" requirements and even an "actual knowledge" threshold for fraud liability, current safe harbor provisions attempt to provide a balance between investors' desire for "soft information" not contained in raw financial data, including management's views of future trends and contingencies, and management's need for reasonable protection from liability for providing that analysis. But completely shielding from liability those corporate statements that touch some political chord would thwart the delicate balance the SEC rules intend to promote. Unaccompanied by "meaningful cautionary statements", even a bad faith disclosure made with "actual knowledge" of its falsity might be sheltered from liability by the First Amendment (to the extent that strict scrutiny might require more than actual malice, perhaps encompassing reliance or actual damages). To the extent companies could utilize the Super Safe Harbor of the First Amendment to mislead investors and generate falsely optimistic expectations, granting politically tinged corporate speech full First Amendment protection would undercut the usefulness of the MD&A requirement at the outset.

III. EXTENDING FULL FIRST AMENDMENT PROTECTION TO CORPORATE SPEECH WOULD CONFLICT WITH THIS COURT'S PRIOR RULINGS BY SEVERELY CURTAILING OR RENDERING UNCONSTITUTIONAL VARIOUS CAUSES OF ACTION PROVIDED UNDER THE SECURITIES ACT, THE SECURITIES EXCHANGE ACT, AND VARIOUS SEC RULES

A. Corporations Could Easily Sidestep Securities Act Anti-Fraud Provisions Designed to Promote the Public Interest and Protect Investors by Encouraging Full and Accurate Disclosure when Companies Sell Stocks and Bonds to the Public.

Construing the First Amendment to protect corporate speech that touches any public concern would severely curtail the availability of civil causes of action under Sections 11 and 12 of the Securities Act. Section 11 establishes a civil cause of action if a registration statement, at the time it was declared effective, "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein not misleading." 15 U.S.C.A. § 77(k). The issuer, its directors, its officers who sign the registration statement, the underwriters and any experts named in the registration statement may be liable to any person who purchased the security. While defendants other than the issuer have a "due diligence" defense that may enable them to escape liability if they acted reasonably in investigating the statements in the registration statement, the issuer remains subject to strict liability for any material misstatements. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1981).

Section 12 provides additional anti-fraud protection under the Securities Act. An investor maintains a right of rescission

against any person who offers or sells a security on the basis of a prospectus or oral communication that includes "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading." 15 U.S.C.A. § 77(l). In contrast to the strict liability standard applied to issuers under Section 11, defendants (including the issuer) may escape liability under Section 12 by demonstrating they did not know, and with the exercise of "reasonable care" could not have known, about the material misstatement or omission. *Id.*

Protecting corporate statements "inextricably intertwined" with political speech (Pet. Br. at 43) would limit the availability of each of those anti-fraud causes of action. To the extent that the misstatement at issue was sufficiently connected to political speech, the misleading statements would be immunized by the First Amendment rather than subjected to the strict liability standard imposed under Section 11. Even the "due diligence" and "reasonable care" requirements—provided under Sections 11 and 12 respectively—might no longer be relevant. As long as the misstatements were sufficiently blanketed in political commentary, the exercise of reasonable care and due diligence would simply be unnecessary. Rather than engage in costly due diligence efforts, potentially liable parties might insist on the cheaper route of intertwining the most troublesome disclosures with political speech. If First Amendment concerns trump the anti-fraud provisions in the Securities Act, certain issuers will undoubtedly engage in an artful alchemy of mixing just enough political commentary with any potentially fraudulent disclosure in order to escape liability.

The ability of issuers to engage in that artful alchemy should not be underestimated. Despite the specific disclosure and reporting obligations set forth in the Securities Act, the Exchange Act and SEC rules, many disclosures that may

seem purely factual or commercial in nature can be couched in qualitative language that touches explicitly upon political concerns. *See* Sections II B &C, *supra* for a discussion of the particular disclosures required by Regulation S-K as applied to the Securities Act and the Exchange Act; *see also* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets,* 55 Brook. L. Rev. 5, 10-13 (1989). Indeed, Petitioner's very case rests on the proposition that some commercial speech remains so closely connected with political commentary that the total exposition of ideas becomes an amalgam that deserves full First Amendment protection. Pet. Br. at 43. And if that protected speech amalgam of commercial and political speech exists when Nike responds to reporters' questions about Nike's overseas labor practices, why should we not expect the same amalgam to present itself when Nike responds to disclosure requirements regarding labor practices or environmental litigation set forth in U.S. securities laws? As companies gain expertise in insulating disclosures from liability under the First Amendment, the anti-fraud provisions contained in the Securities Act will become nugatory.

B. The Anti-Fraud Provisions Under the Exchange Act and SEC Rules Promulgated Thereunder, Designed to Promote the Public Interest and Protect Investors by Encouraging Full and Accurate Information in the Trading Markets, Such as the New York Stock Exchange and NASDAQ, Could be Severely Debilitated by a Broad Ruling.

Providing broad protection to corporate speech under the First Amendment could also severely hamper the viability of causes of action arising under Sections 10(b) and 14 of the Exchange Act and related SEC Rules. Section 10(b) of the Exchange Act and SEC Rule 10b-5 generally prohibit the use of a materially misleading statement, omission or any

manipulative or deceptive device in connection with the purchase or sale of securities. 15 U.S.C. 78(j); 17 C.F.R. § 240.10b-5. This Court has long recognized an implied private cause of action under Rule 10b-5 that covers statements in a broad range of venues, including statements to the press, statements in periodic reporting in annual or quarterly statements, or statements over the Internet. Imposing 10b-5 liability on an issuer, its directors or executive officers requires, among other elements, a demonstration that the misstatement or omission was made with "scienter" (i.e., that the defendant intentionally or recklessly caused a material misstatement or omission). *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). Thus, while Rule 10b-5 covers a broad range of activities, the level of proof necessary to sustain a claim remains quite high.

Section 14(a) and SEC Rule 14a-9 prohibit the use of materially misleading statements or omissions in connection with the solicitation of proxies in connection with shareholder votes. Again, this court has long recognized an implied right of action arising under Rule 14a-9 and remedies include both damages and injunctive relief. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 171 (1994); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1086-87 (1991). Unlike a 10b-5 claim, however, establishing liability under Rule 14a-9 does not require demonstrating scienter on the part of the issuer, its directors or executive officers. Instead, establishing negligent conduct suffices to maintain an anti-fraud claim under Rule 14a-9. *Shidler v. All American Life & Financial Corp.*, 775 F.2d 917, 926 (8th Cir. 1985).

Shielding corporate speech under the First Amendment, however, drastically reduces the availability of private causes of action under Sections 10 and 14. With respect to a 10b-5 claim, even if an investor could establish the requisite scienter, a disclosure sufficiently connected to a public

concern would potentially insulate the statement from liability, since strict scrutiny might require demonstrating more than scienter (including reliance). For instance, Nike might state in the "Description of Business—International Markets" section of its annual report, "As part of Nike's commitment to promoting freedom and democracy, Nike remains dedicated to expanding its operations in lesser developed African nations." Even if Nike had no intention of expanding its operation in Africa, and made the statement with knowledge of its falsity, the statement could nonetheless constitute "commercial speech [that] is thus 'inextricably intertwined' with noncommercial speech on matters of public concern" so as to deserve full First Amendment protection. Pet. Br. at 43. Despite Petitioner's reading of the First Amendment, that false statement seems to represent the very kind of fraudulent speech that Rule 10b-5 intends to prohibit.

The problem becomes even more severe in the context of 14a-9 claims that do not require scienter. If the same statement about Nike's international plans were contained within a proxy solicitation, liability would arise under 14a-9 simply by demonstrating the statement was material and made negligently. In contrast to a standard 10b-5 claim, the Exchange Act and the SEC Rules intend to afford investors a heightened level of protection from deceptive speech in the context of proxy solicitations by reducing the level of culpability necessary to support a claim. *Virginia Bankshares,* 501 U.S. at 1103-04. While the securities laws as interpreted by this Court and the SEC contain a range of causes of action with different levels of culpability, embracing broad First Amendment protection for corporate speech would risk eliminating much of the force behind those distinctions. Despite the increased protection that the securities laws extend to proxy contests, corporations could once again avoid liability by couching potentially risky disclosures in political speech.

C. Adopting Petitioner's "Actual Malice" Standard Would Conflict with This Court's Prior Rulings By Rendering Unconstitutional Various Provisions of the Securities Act, the Exchange Act and Various SEC Rules.

In order to determine if the First Amendment protects commercial speech that implicates some public concern, Nike advocates adopting an "actual malice" standard that uses knowing falsity or recklessness to assess whether or not corporate speech falls outside the umbrella of Constitutional protection. Pet. Br. at 43. According to Petitioner's Brief, the California laws under which the California Supreme Court held Nike ultimately accountable "violate the First Amendment because they would impose strict liability, or at least liability based on mere negligence, for misstatements on matters of public concern." Pet. Br. at 44.

But the precise reasons Nike offers to invalidate the California laws would also render unconstitutional various sections of the Securities Act, the Exchange Act and SEC Rules. After all, issuer liability under Sections 11 and 12 of the Securities Act are predicated upon a strict liability theory. Moreover, the "due diligence" and "reasonable care" defenses available to non-issuer defendants would clearly not reach the level of recklessness that the "actual malice" standard entails. Similarly with respect to liability under Section 14 of the Exchange Act and Rule 14a-9, the negligence standard on its face would fail to surmount the recklessness hurdle. Despite the numerous cases in which this Court has embraced those same causes of action, Nike would have this Court overrule each of those prior decisions and declare unconstitutional the primary sections of the Securities Act, the Exchange Act and SEC Rules under which investors seek relief from securities fraud. Thus, adopting Nike's proposal for an "actual malice" standard would conflict with a long-line of this Court's prior

decisions and leave the accuracy of information in the securities markets at risk, at a time when restoring confidence in the markets is of the utmost importance.

IV. EXTENDING FULL FIRST AMENDMENT PROTECTION TO CORPORATE SPEECH COULD HAVE PARTICULARLY SERIOUS IMPLICATIONS FOR PROXY REGULATION

Finally, *amici* are particularly concerned about the potential impact of a broad ruling upholding Nike's definition of non-commercial speech on the proxy process, particularly shareholders' continuing access to that process. Companies communicate with their shareholders in conjunction with the annual meeting or extraordinary transactions such as mergers in statements called "proxy statements," the contents of which contain compelled disclosure. Thus, the same issues concerning compelled disclosure discussed above need to be considered. *See supra*, at 14-17.

There is, however, another aspect to the process that needs to be considered, and that is the power of shareholders to require companies to include shareholders' proposals in the company's proxy statement for action at the annual meeting (called "shareholder resolutions"). This is an important tool regularly used by shareholders to encourage stronger corporate governance and corporate social responsibility. *Amici* regularly use shareholder resolutions to bring social, environmental, economic and corporate governance issues to the attention of other shareholders. This "proxy season" has seen a record number of shareholder resolutions introduced in reaction to the recent corporate governance problems at many leading companies. Claudia H. Deutsch, *Revolt of the Shareholders: At Annual Meetings, Anger Will Ratchet Up a Notch*, N. Y. TIMES, Feb. 23, 2003, § 3 (Money & Business), at 1. Examples of corporate governance shareholder resolutions introduced in 2003 include resolutions "at General Electric to trim severance packages, [at] Citigroup to eliminate golden parachutes, [at] Sprint to stop repricing the stock options granted to management and [at] Delta Air Lines to charge stock options against earnings." *Id.* Some are more overtly political, such as a resolution at Halliburton which asks the Board to review potential financial and reputational risks arising from conducting business in Iran, given that country's alleged support of terrorists. *Id.* Many shareholder proposals that *amici* have introduced seek information from companies on their environmental or "sweatshop related" risks, or ask companies to report on their labor and diversity statistics, or other matters concerning their social performance.

Since all of these shareholder resolutions are matters of public concern, the ability of shareholders to continue to have their views communicated in light of cases such as *Riley* and *Pacific Gas and Electric Co.*, which have struck down compelled disclosure of political speech, must be considered in any evaluation of Nike's expansive definition of political speech. Particularly given the events in corporate governance over the last year, this is not the time to undermine shareholders' power in corporate governance, or to loosen constraints of accountability on corporate management.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be upheld.

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No. 02-575

Supreme Court, U.S.
FILED
APR 4 2003
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In The
Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF OF *AMICI CURIAE* THE STATES OF CALIFORNIA, ALASKA, ARIZONA, CONNECTICUT, FLORIDA, ILLINOIS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, VERMONT, AND WEST VIRGINIA AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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INTRODUCTION

Image advertising has become an essential marketing tool stimulating product purchase by associating, often with great subtlety, use of the product with consumer achievement of the lifestyle, values, or aspiration promoted. Plaintiff claims that Nike's well-cultivated image as a socially responsible company is instrumental to its successful product promotion. When sales were threatened by charges that Nike products were manufactured under execrable conditions in foreign sweatshops, Nike allegedly undertook a publicity campaign replete with false statements of fact about its own manufacturing operations to deceive the public about the true conditions under which its athletic footwear and apparel are produced in order to rehabilitate its image and foster product sales.

This case is before this Court on a review of the pleadings and is thus framed entirely by plaintiff's complaint. Since the material allegations of the complaint must be deemed true on demurrer (motion to dismiss), the California Supreme Court concluded that the complaint stated a cause of action under the state's false advertising law and alleged facts constituting false commercial speech that could be proscribed. *Kasky v. Nike, Inc.*, 45 P.3d 243, 262 (Cal. 2002). California's high court rejected Nike's effort – renewed in this Court and entirely unsupported by the record – to recast this matter as a debate of ideas and opinion about economic globalization: as framed by the pleadings, this case is only about Nike's ability to exploit false facts to promote commercial ends. Moreover, since false commercial speech may be prohibited, California may allow private party suits seeking limited equitable remedies on behalf of the general public to redress false advertising.

INTEREST OF *AMICI*

All states prohibit the dissemination of untrue statements to facilitate the sale of goods and services. With increasingly sophisticated modern marketing techniques, products and services are promoted not only by statements about price and performance but also by representations about the image of the product and the conduct of the manufacturer. The Court's opinion may substantially affect the application of the First Amendment to false advertising laws and, thus, may affect future law enforcement efforts. Moreover, challenges to state law that could have been, but were not, raised in the lower courts should not be vetted for the first time in this Court lest states be deprived of a full opportunity to defend their laws. Furthermore, California has a special interest in upholding its statute permitting private parties to seek limited equitable remedies on behalf of the general public to staunch the dissemination of false commercial speech.

SUMMARY OF ARGUMENT

The complaint alleges that Nike engaged in a publicity campaign asserting objectively verifiable false facts to mislead consumers about Nike's labor practices in order to assuage consumer concerns and promote the sale of Nike products. The material allegations of the complaint are deemed true on a review of the sufficiency of a pleading; there is no record other than the complaint. The California Supreme Court properly concluded that the complaint alleged false commercial speech that could be constitutionally redressed under state false advertising law. Furthermore, state procedure allowing private parties to seek limited discretionary equitable relief to remedy false commercial speech without proof of damages or actual malice does not impermissibly chill commercial speech,

and petitioner's contrary argument improperly raised for the first time in this Court should not be entertained.

ARGUMENT

I. NIKE'S FALSE STATEMENTS ABOUT ITS FOREIGN LABOR PRACTICES DISSEMINATED AS PART OF A PUBLICITY CAMPAIGN TO PROMOTE PRODUCT SALES IS FALSE COMMERCIAL SPEECH THAT MAY BE CONSTITUTIONALLY PROSCRIBED

A. The Complaint's False Advertising Allegations Are Deemed True On Review Of A Demurrer

This case is before the Court on the review of a demurrer. No evidence has been introduced, and no fact has been adjudicated. A demurrer, like a motion to dismiss under federal practice, tests whether a complaint articulates a cause of action. *See* Cal. Civ. Proc. Code § 430.10(e); Fed. R. Civ. P. 12(b)(6). In assessing the sufficiency of the complaint, the California Supreme Court was required to accept the truth of the complaint's allegations. *See Kasky*, 45 P.3d at 247. Similarly, this Court held that in reviewing a motion to dismiss under federal standards "'we must assume the truth of the material facts as alleged in the complaint.'" *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 633 (1999). The plaintiff's ability actually to prove its allegations is not at issue under either federal or state practice. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Committee on Children's Television, Inc. v. General Foods Corp.*, 673 P.2d 660, 670 (Cal. 1983).

Stripped to its essence, the lengthy complaint states that Nike purposefully made a series of *false* representations as part of its "advertising, promotional campaigns, public statements and marketing" efforts "in order to

maintain and/or increase its sales and profits." First Am. Compl. ("FAC"), ¶¶75, 79, 82(b), 84, Pet. Lodging at 30-31, 34-35. Plaintiff contends that Nike *falsely* stated that it (1) complies with applicable foreign wage and hour rules, (2) guarantees workers who are employed by foreign subcontracting manufacturers a "living wage," (3) pays workers in subcontracted factories double the minimum wage, (4) provides workers with free meals and health care, (5) complies with worker health and safety and environmental standards, and (6) protects workers from physical abuse by the subcontractors who own the factories. *Ibid.*

Plaintiff further alleges that Nike made the false representations of fact at issue "in response to the public exposure of Nike's labor practices in Southeast Asia" by human rights groups that harshly criticized the working conditions supposedly existing in the factories producing Nike's shoes and clothing. *Id.* ¶18, Pet. Lodging at 7-8. Nike's alleged false representations were purportedly designed to overcome what the complaint describes as a "sweatshop stigma" (*Id.*, Pet. Lodging at 7, l. 18 *et seq.*) to preserve both product and corporate image and thereby maintain and promote the desirability of the product and its sale the success of which had been adroitly nurtured through a $1 billion annual multi-year marketing effort. *Id.* ¶13, Pet. Lodging at 6.

Nike demurred to the complaint on First Amendment and state constitutional grounds. Nike's central contention was that it was drawn into a debate about globalization, economic policy, and labor standards and that its response to public attacks was absolutely protected. Plaintiff, however, argued that Nike made the allegedly false statements to fend off the call for a boycott and to preserve and, indeed, foster its reputation as a socially responsible company with which the public could deal without fear of promoting labor exploitation. Plaintiff, thus, argued that

Nike's statements were designed to promote sales and were a form of false commercial speech that receives no First Amendment protection.

B. Nike Has Manufactured An Image Of Social Responsibility As A Means Of Promoting Product Sales

1. Image Promotion Is An Essential Aspect Of Product Promotion

Modern marketing techniques may so inextricably link a product to an image that the promotion of the product's image or the image of the product's manufacturer is the promotion of the product:

> [T]he idea that brands can have a personality or image reflects the fact that people buy many products and services not only for what such products or services can do, but also for what they mean to the person or his or her reference group. In marketing terminology, products and services offer the user both functional and psychological benefits.

GRAHAME DOWLING, CREATING CORPORATE REPUTATIONS: IDENTITY, IMAGE, AND PERFORMANCE 17 (2001). Indeed, "[n]urturing, protecting, or exploiting a reputation . . . often determines whether a given company, product, or brand will succeed or fail." JOE MARCONI, REPUTATION MARKETING: BUILDING AND SUSTAINING YOUR ORGANIZATION'S GREATEST ASSET 2 (2002); *see* GRAHAME DOWLING, *supra*, at 10-11, 14, 16; S. HOWARD, CORPORATE IMAGE MANAGEMENT: A MARKETING DISCIPLINE FOR THE 21ST CENTURY 217 (1998). Accordingly, "[t]he best product advertising also sells the company as a good source for the product, and the best image advertising recognizes that the company itself is a 'product' over and above its subordinate products. . . . " A. Allen, *Corporate Advertising – Out*

of the Ivory Tower, Into Marketing, SOURCEBOOK ON CORPORATE IMAGE AND CORPORATE ADVOCACY ADVERTISING, 570 (Federal Trade Commission 1978).

Indeed, company image is important because it relates directly "to how comfortable customers feel about buying and using products." N. GREGORY, MARKETING CORPORATE IMAGE: THE COMPANY AS YOUR NUMBER ONE PRODUCT 96 (1991). In the 21st century marketplace,

> today's consumer is looking for the company that produces what they buy to provide more than a simple product. Increasingly they are looking behind the brand and the products to scrutinize the behaviour and reputation of the company that produces or sells them the item. In fact, in many cases the brand is becoming secondary to the company that makes it.

CHRIS GENASI, WINNING REPUTATION: HOW TO BE YOUR OWN SPIN DOCTOR 38 (2002).

Companies now operate in a "business climate influenced by major societal themes," one of which involves adherence to "global responsibility standards." Jim Kartalia, *Reputation At Risk?*, 47 RISK MANAGEMENT NO. 7 (July 1, 2000), 2000 WL 8276979. If consumers believe that a company is not acting as a good corporate citizen, consumers will look to other product providers:

> The 'new consumer' is one who will, or will not, buy a product or service based on a company's reputation. A recent Walker Group study found that 48 percent of consumers refused to buy from companies whose business practices they found objectionable. Thus, as the pocketbook has become an all-powerful weapon, shaping positive perceptions is critical to maintaining a competitive edge. Criteria for judging corporations are based on broader measures than in the past. . . .

> [C]orporations are also being judged on their public responsibility behavior.

S. GARONE (ed.), *Designing A Consumer Awareness Campaign*, SHAPING A SUPERIOR CORPORATE IMAGE: A CONFERENCE REPORT 40 (Conf. Bd., Inc. 1996). Nike's alleged deceptive publicity campaign was designed to rehabilitate and enhance its image.

2. Nike Has Cultivated A Corporate Image Of Social Progressivity As A Marketing Tool To Promote Product Sales

Nike has made a celebrated effort to depict itself as a socially responsible company whose athletic shoes had a transformational quality enabling people to break out of the social roles consigned by age, race, and sex. These advertisements –

> conveyed the idea that Nike sneakers were worn by people of all ages, genders, and disabilities, and that the buyers of Nike shoes had the grit and determination to take on the type of challenges included in the advertisements. . . . 'the roads are always open. Just Do It.' Wearing Nikes offered a route to spiritual if not political salvation.

RANDY SHAW, RECLAIMING AMERICA: NIKE, CLEAN AIR, AND THE NEW NATIONAL ACTIVISM 17 (1999); *see* MARCONI, *supra*, at p. 58 ("Running shoes as a symbol of rebellion and individuality? Nike sold them that way – and at a premium price."). Nike's marketing, thus, suggests that buying Nike products is "part of expressing who you are, what you stand for and what you believe in." Steve Suo, *Nike Takes Own Advice In Changing Its Slogan*, PORTLAND OREGONIAN (January 4, 1998), 1998 WL 4171086.

If product success is predicated on emotional connections between the consumer and the company or product,

Nike's carefully engineered image of social progressivity – and the commercial success built on that image – could turn like the image of Dorian Gray if the company's professed commitment to social responsibility is untrue:

> the discovery that Nike might be associated with slavery and child labor seemed particularly disturbing because it so diverged from the image that most people have of Nike through its advertising. . . . Could the Nike we associate with the swoosh and its meanings of empowerment and the freedom to achieve, really be up to its ears in the sordid injustices it is accused of?

ROBERT GOLDMAN & STEPHEN PAPSON, NIKE CULTURE: THE SIGN OF THE SWOOSH 10 (1998). Consumers appear to be particularly sensitive to issues of labor and human rights abuses:

> in a Corporate Edge survey, 58% of the consumers polled said that they would boycott a brand if they knew that the company was employing children to make their product. A 1995 survey showed that 78% of their sample would patronize retail stores committed to stopping the abuse of garment workers. The same survey showed that 84% of the consumers sampled would pay $1 extra on a $20 purchase if the item was manufactured in a worker-friendly environment. Corporations have also recognized the materiality of human rights in the process of consumer decision making. For example, PepsiCo suffered for its operations in Myanmar when Harvard University reversed its plan to transfer $200,000 worth of cola purchases to Pepsi as a result of student concern over PepsiCo's contribution to human rights abuses in Myanmar. A spokesperson from Reebok openly stated that 'consumers today hold companies accountable for the way products are made, not just the quality of the product itself.'

Su-Ping Lu, *Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 603, 624 (2000).

Nike incurred a consumer backlash when its foreign labor practices were equated with sweatshop working conditions: the company became the target of a call for a consumer boycott, the company suffered losses in 1998 for the first time in 13 years, and the entire imbroglio was viewed as a "PR disaster." *See* James Curtis, *Public Relations: PR Takes Center Stage,* CAMPAIGN (March 10, 2000), 2000 WL 9853049. Nike responded, in part, with the statements that are at issue in this appeal.

C. The First Amendment Does Not Protect A Company's False Statement Of Fact About Its Own Product Or Business Operations

1. The Commercial Speech Doctrine

In *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), this Court abandoned its long-standing categorical rejection of commercial speech from the ambit of First Amendment protection but recognized that "Some forms of commercial speech regulation are surely permissible." *Id.* at 770. The Court specifically acknowledged the right to prohibit false and misleading commercial speech. *Id.* at 771-72. In the Court's view, the truthfulness of commercial speech could be verified by its disseminator and its vital role in generating commercial profits made it a particularly hardy form of speech less likely to be chilled by proper regulation than other forms of speech. *Id.* at pp. 771-72 and n.24. The Court has never wavered in holding that "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading. . . ." *Zauderer v. Office of Disciplinary Counsel* 471 U.S. 626, 638 (1985); *see, e.g., Thompson v. Western*

States Med. Cent., 122 S.Ct. 1497, 1504 (2002); *Central Hudson Gas & Electric Corp v. Public Service Com.*, 447 U.S. 557, 563 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

The "precise bounds of the category of expression that may be termed commercial speech" is subject to doubt. *Zauderer,* 471 U.S. at 637; *see, e.g., In re Primus*, 436 U.S. 412, 438 n.32 (1978) (line between commercial and non-commercial speech "will not always be easy to draw"). Moreover, "the diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Indeed, the context in which particular speech is expressed may determine whether it has a commercial character. *See Zauderer*, 471 U.S. at 637 n.7 (discussion of injured person's legal rights may be protected speech in one context but commercial speech in the context of a lawyer's solicitation of business).

The most common description of commercial speech is speech that does "no more than propose a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983). This Court has also referred to commercial speech as "expression solely related to the economic interests of the speaker and its audience." *Central Hudson,* 447 U.S. at 561.

Commercial promoters, however, cannot gain core First Amendment protection for commercial speech by conflating a commercial message with a discussion of public issues. This Court recognized that "many, if not most, products may be tied to public concerns about the environment, energy, economic policy, or individual health and safety" and that the linkage of commercial speech to matters of public debate does not elevate commercial speech to core First Amendment protection. *Central Hudson,* 447 U.S. at 562 n.5; *accord Zauderer*, 471 U.S.

637 n.7; *see National Commission on Egg Nutrition v. FTC,* 570 F.2d 157 (7th Cir. 1977), *cert. den.*, 439 U.S. 821 (1978) (trade association's statements minimizing health concerns about cholesterol and encouraging consumers to buy eggs were commercial speech promoting egg consumption merely disguised by the rhetoric of public health debate).

In *Bolger*, a manufacturer of condoms distributed pamphlets touting its products and discussing the general use of condoms in halting the spread of venereal disease. This Court noted that the pamphlets were advertisements, the pamphlets referred to specific products, and the distribution of the pamphlets was economically motivated. Each of these factors, standing alone, would not necessarily make the speech commercial in character, but the combination of these factors established that the speech was commercial notwithstanding the discussion of public health issues. *Bolger,* 463 U.S. at 66-68. The Court also noted, however, that these three factors need not all be present to find that speech was commercial in character. *Id.* at 67. The Court specifically expressed no opinion about whether reference to any particular product or service is a necessary element of commercial speech. *Id.* at 66, n.13, 67, n.14. The teaching of *Bolger* is that a statement directed to a commercial audience about a product to induce purchase has the hallmark of commercial speech.

In *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 474-75 (1989), this Court went further by indicating that the linkage between commercial speech and public issues would have to be inextricable to give the speech fully protected First Amendment status. The Court concluded that a promotion of Tupperware was commercial speech despite inclusion of a home economics discussion: "No law of man or of nature makes it impossible to sell

housewares without teaching home economics, or to teach home economics without selling housewares." *Id.* at 474.

The gist of the complaint in this action is that Nike made a series of false statements about its foreign labor practices as part of a publicity campaign to "entice consumers who do not want to purchase products made in sweatshop and/or unsafe and/or inhumane conditions" (FAC, ¶27, Pet. Lodging at 11) to purchase its products. *Id.* ¶¶75, 79, 82(b), and 84, Pet. Lodging at 31-32, 34-35. For example, Nike allegedly stated before Christmas:

> Consumers are savvy and want to know they support companies with good products and practices. . . . During the shopping season, we encourage shoppers to remember that NIKE is the industry's leader in improving factory conditions. Consider that Nike established the sporting goods industry's first code of conduct to ensure our workers know and can exercise their rights.

Id. ¶27, Pet. Lodging at 11. This statement is obviously an invitation to buy.

The alleged factual misrepresentations about Nike's own labor practices do not lose their character as commercial speech by being linked to a public debate. Nike can freely discuss economic globalization without reference to whether Nike itself employs underage workers or pays them twice the minimum wage. To paraphrase *Fox*, no law of man or nature requires Nike to discuss globalization by making specific objective factual claims about practices at its own particular factories.

2. The California Supreme Court Properly Applied Commercial Speech Doctrine

The California Supreme Court properly found that a seller may propose a commercial transaction with

statements about factors other than product characteristics; for example, a seller may focus on who, how, or where a product is made. Specific statutes have long prohibited misrepresentations about the circumstances or context of a product's manufacture or sale. For example, state law proscribes false or misleading statements regarding whether products were made by blind workers[1], American Indians[2], or union labor[3]. Neither the source, sponsorship of a product, nor the affiliation or certification of a seller may be misrepresented[4]. Special rules also govern untrue or misleading statements regarding how a product was produced, such as claims that a product was made or can be used or disposed in an environmentally sound manner[5]

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[1] *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1976 (2003); Cal. Bus. & Prof. Code § 17522 (West 2002); Fla. Stat. Ann. ch. 413.021 (2002); Md. Code Ann., Com. Law § 14-2802-2803 (2002); N.Y. Gen. Bus. Ann. § 396-f (2003); Ohio Rev. Code Ann. § 5109.17-5109.18 (2002); Va. Code Ann. § 51.5-102 (2003).

[2] *E.g.*, Cal. Bus. & Prof. Code, § 17569 (2002).

[3] *E.g.*, Cal. Lab. Code § 1011(a), 1012 (2002); *see also* Cal. Lab. Code § 1014; Fla. Stat. ch. 506.06 (2002); Or. Rev. Stat. § 661.210 (2001); E. H. SCHOPLER, *Rights in Union Label, Shop Card, or Other Insignia Denoting Union Shop or Workmanship*, 42 A.L.R.2d 709 (1955) (protection of label/mark signifying union labor).

[4] *See, e.g.*, Cal. Civ. Code §§ 1770(a)(2) and (3) (2002); D.C. Code § 28-3904(a)-(b) (2002); Fla. Stat. ch. 501.047(2) (2002); 815 Ill. Comp. Stat. Ann. 510/2(a)(2)-(3), (5) (2003); Md. Code Ann., Bus. Reg. § 1-404(a), (b)(1)-(2), (b)(i)-(iv) (2002); Miss. Code Ann. § 75-24-5(2)(b)-(c), (e) (2003); N.H. Rev. Stat. Ann. § 358-A:2(II)-(III), (V) (2002); Tex. Bus. & Com. Code Ann. § 17.46(b)(2)-(3), (5) (2003); Va. Code Ann. § 59.1-200(A)(2)-(3), (5) (2003); W.Va. Code Ann. § 46A-6-102(f)(2); 15 U.S.C.A. tit. § 1125(1)(A) (2003).

[5] *See, e.g.*, Cal. Bus. & Prof. Code § 17580.5 (West 1995); Fla. Stat. ch. 403.7193 (2002); Mich. Comp. Laws § 445.903(3)(1)(dd, ee) (2002); N.H. Rev. Stat. Ann. § 149-N:1 *et seq*. (2002); N.Y. Envtl. Conserv. Law § 27-0717 (McKinney 1997); 16 C.F.R. § 260.1 *et seq*. (2003) (FTC "Guides for the Use of Environmental Marketing Claims").

or that food is "organic"[6] or "dolphin safe."[7] Various laws ensure that where a product was produced is honestly stated.[8] Consumers may prefer to purchase products from companies that protect the environment, support the symphony or the local high school basketball team, avoid cruelty to animals in product testing, underwrite tutoring programs for inner-city youth, or finance cancer research. A false statement of fact that products were produced by disabled army veterans or were not produced by the forced labor of Chinese Christian religious dissidents may be more important to consumers than price or product quality in determining whether to purchase a product. Indeed, Nike's alleged misleading press releases and public letters about its labor practices were created directly to "advance an economic transaction" with consumers concerned about the labor conditions in overseas factories.

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[6] *See, e.g.*, 7 U.S.C. § 6501 *et seq.* (2003); Cal. Health & Safety Code § 110910 (West 1996 & Supp. 2002); Colo. Rev. Stat. § 35-11.5-101 *et seq.* (2002); Fla. Stat. ch. 504.23 *et seq.* (2002); Ga. Code Ann. § 2-21-4 (2002); Mich. Comp. Laws § 286.911 (2003); Tex. Agric. Code Ann. § 18.005 (Vernon's 2001); Va. Code Ann. § 3.1-385.2 (Michie 2002); Wash. Rev. Code § 15.86.030 (2003).

[7] 50 C.F.R. § 216.91.

[8] *See, e.g.*, Cal. Bus. & Prof. Code § 17533.7 (2002) ("Made in U.S.A.") and Civ. Code, § 1770(a)(4) (geographic origin); Colo. Rev. Stat. Ann. § 6-1-105(d) (2002); D.C. Code § 28-3904(t) (2002); Fla. Stat. ch. 501.97 (2002) (geographic origin); Fla. Stat. ch. 601.99 (2002) ("Florida citrus"); Ga. Code Ann. § 10-1-372(a)(4) (2003); Ga. Code Ann. § 10-1-393(b)(4)(A) (2003); Haw. Rev. Stat. Ann. § 481A-3(a)(4) (2002); Haw. Rev. Stat. § 486-120.6 (2002) ("All Hawaiian" coffee); Ill. Comp. Stat. Ann. § 510/2(a)(4) (2003); Md. Code Ann., Bus. Reg. § 1-404(c)(ii) (2002); Minn. Stat. Ann. § 325D.44(4) (2003); N.H. Rev. Stat. Ann. § 358-A:2(IV) (2002); Tex. Bus. & Com. Code Ann. § 17.46(b)(4) (2003); Utah Code § 13-11a-3(1)(d) (2002); Va. Code Ann. § 59.1-200(A)(4) (2003); W.Va Code Ann. § 46A-6-102(f)(4) (2002); Vt. Stat. tit. 6, § 490 *et seq.* (2002) ("Vermont maple syrup"); 15 U.S.C.A. tit. § 1125(1)(B) (2003).

No prior case has ever limited the commercial speech doctrine to speech involving only product characteristics, price, or availability. For example, statements about the education, experience, and qualifications of persons providing or endorsing services have been treated as commercial speech even when unaccompanied by a direct offer to provide services. *See Ibanez v. Florida Dept. of Bus. and Prof. Reg., Bd. of Accountancy*, 512 U.S. 136 (1994) (use of title "CPA"); *Peel v. Attorney Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (indication of board certification). Thus, this Court upheld a generic ban on the use of trade names by optometrists, which did not directly involve any misrepresentation concerning optometric services, because trade names could obscure the identity and qualifications of optometrists. *Friedman v. Rogers*, 440 U.S. 1 (1970); *see Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915 (7th Cir. 1984) (speech not involving product characteristics but aimed at maintaining advantageous foreign commercial relationships could be regulated as commercial speech).

The proposal of a commercial transaction, thus, may not only involve the offer of Product A at Price B but the offer of a product produced under circumstances, such as the conditions of manufacture, that transcend the particular physical characteristics of the product. Indeed, the Nike web site contains specific factual assertions about its contributions to the environment, the improvement of conditions for foreign workers, and the diversity of its domestic employees.[9]

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[9] The "corporate responsibility" category of Nike's web site affirmatively presents positions on environmental, worker diversity, and foreign manufacturing practice issues (<http://nikebiz.com> Mar. 18, 2003) such as "Nike's commitment is to provide workers making our

(Continued on following page)

The commercial harm involved in disseminating false statements about these matters to induce sales is that customers are led to patronize and support a business from which they might not otherwise buy and are diverted from dealing with honest enterprises whose conduct they support. It may be true that one can run just as fast with a Nike shoe manufactured by child labor or by physically abused Asian women as with a shoe manufactured under locally lawful labor conditions, but deceiving consumers through allegedly false statements of fact regarding the circumstances of manufacture deprives consumers of their ability to make choices in the marketplace.

Indeed, the socially conscious manufacture and sale of products may not only furnish the commercial lure of the product but may be a factor justifying a higher price because of the implicit increased cost of manufacturing and selling in a socially responsible way. The advertisement of false facts to inflate a corporate image may also mislead employees and investors who would not otherwise

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products with the best workplaces possible." <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=compliance>. Nike discusses specific programs it sponsors to ameliorate working and living conditions in Third World countries, such as $1.3 million in grants for higher education programs <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=communityprograms&subcat=education> and $1 million in loans to 5,300 Southeast Asian families, including 3,200 rural Vietnamese women and farm workers. <http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=communityprograms&subcat=smbizloans> Nike also presents specific information about employee salaries such as the fact that Indonesian entry level contract workers make at least 10-25% more in cash and allowances than local governments require. <http://swoosh.custhelp.com/cgi-bin/swoosh.cfg/php/enduser/std_adp.php?p_sid=i_4P6HDg&p_lva=&p_faqid=247&p_created=1022195687&p_sp=cF9zcmNoPTEmcF9ncmlkc29ydD0mcF9yb3dfY250PTIzJnBfc2VhcmNoX3RleHQ9JnBfcHJvZF9sdmwxPTQwJnBfcHJvZF9sdmwyPTUyJnBfcGFnZT0x&p_li=>.

be attracted to the company. *See Pittsburgh Press Co. v. Human Rel. Com.*, 413 U.S. 376 (1973) (advertisements for employment are commercial speech).

The misrepresentations alleged in this case are no less commercial in character because they were disseminated in promotional campaigns, public statements, and marketing, in addition to conventional advertisements. *See, e.g.*, FAC, ¶75, Pet. Lodging at 31. None of the commercial speech cases requires that speech be contained in a conventional advertising format for that speech to be reviewed under the commercial speech doctrine. Commercial speech may be disseminated through an informational pamphlet (*see Bolger,* 463 U.S. at 66) or an in-person sales presentation to small groups (*see Fox,* 492 U.S. at 472), while political messages may appear in a paid advertisement. *See Bolger*, 463 U.S. at 66 *citing New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). The complaint pleads the existence of a publicity campaign, and in the world of modern advertising, an advertising message need not come packaged as an advertisement.

Marketing consultants advise companies to promote corporate image through press releases, press conferences, media alerts, press kits, bylined articles, meetings with newspaper editorial boards, one-on-one interviews with reporters, seminars, newsletters, and "Op-Ed." articles. S. SAUERHAFT & C. ATKINS, IMAGE WARS: PROTECTING YOUR COMPANY WHEN THERE'S NO PLACE TO HIDE 62, 76-95 (1989). Multi-faceted media "damage control" is advised to rebut accusations tarnishing corporate image: "Advertise your position through letters, paid ads, press releases, newsletters, letters to the editors, and calls to talk shows." GENASI, *supra*, at 141. The complaint in this case alleges this type of concerted and orchestrated public relations effort.

II. PRIVATE FALSE ADVERTISING ACTIONS FILED ON BEHALF OF THE GENERAL PUBLIC DO NOT THREATEN COMMERCIAL SPEECH

A. A Proper Respect For States And Their Judiciaries Requires That Any Challenge To Private False Advertising Suits As Chilling First Amendment Rights Should Have Been Raised First In California Courts

Nike, supported by the United States, claims for the first time that California violates the First Amendment by allowing private citizens to bring civil actions for equitable relief on behalf of the general public to redress false advertising violations. The gist of the argument is that a limitless number of "private attorney general" actions *could* be filed to challenge alleged false advertising because the state statute does not require that the plaintiff or the public be directly, measurably harmed by the violation or that the plaintiff demonstrate that the defendant acted with actual malice; the mere possibility that a case *could* be filed supposedly would deter even a commercial speaker from disseminating commercial messages. This argument was never pressed or passed upon by any California court: the sole issue presented to the California Supreme Court and Court of Appeal was whether Nike's alleged false factual statements constituted commercial speech. *Kasky*, 45 P.3d at 247-49.

This Court has long refused to consider any constitutional challenge "unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *see, e.g., Sprietsma v. Mercury Marine*, 123 S.Ct. 518, 522 n.4 (2002); *McGoldrick*

v. Compagnie Generale Transatlantique, 309 U.S. 430, 434-35 (1940). Indeed, "this is a court of final review and not first view." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110-11 (2001). Sound reasons support this rule:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Cardinale v. Louisiana, 394 U.S. 437, 438-39 (1969).

Nike's first-time facial constitutional challenge in this Court is particularly inappropriate because the California Attorney General was not presented with a proper opportunity to defend the law in the courts below. The states' attorneys general have obvious interest in defending the constitutionality of state laws. Respect for state sovereignty is reflected in federal policy ensuring that the states, through their attorneys general, have a full opportunity to appear in cases in which the constitutional validity of state law is assailed. *See* 28 U.S.C. § 2403(b). An eleventh-hour facial challenge in this Court, however, deprives the states' attorneys general of their ability, for example, to intervene in proceedings, establish a factual record supporting state law, or offer a construction of state law that would obviate constitutional challenge. Moreover, Nike apparently even ignored this Court's mandate that "the initial document filed in this Court shall recite that 28 U.S.C. § 2403(b) may apply and shall be served on the

Attorney General of that State" when the constitutionality of a state law is "drawn into question" and the state has not appeared as a party.[10] Sup. Ct. R. 29.4(c).

If Nike's facial constitutional challenge had been presented to the California courts, the state courts could have considered whether speech has been impermissibly chilled during the 70 years[11] in which injunctive relief and 30 years[12] in which restitution have been available to private parties in false advertising cases. Surely, Nike would have developed a record of the calamitous consequences of the private right of action – if there are any – rather than present merely doomsday speculation for the first time to this Court.

Moreover, if Nike had presented a meritorious argument, the California Supreme Court or Court of Appeal could have construed state law to avoid putative constitutional conflict. *See Kraus v. Trinity Management Services, Inc.*, 999 P.2d 718, 732 (Cal. 2000) (construing restitutionary provisions of unfair trade practice law to preclude fluid recovery, in part, to avoid potential due process concerns). The state appellate courts also could have considered the challenge to private party standing as part of Nike's *state*

[10] The California Attorney General was not served with the Petitioner's Brief at the same time as the parties (the document was received on March 10, 2003) and is unaware of any document filed with this Court that indicates the potential applicability of 28 U.S.C. § 2403(b). Under state law, every appeal affecting the application of the state's false advertising law must be served on the Attorney General. *See* Cal. Bus. & Prof. Code §§ 17209, 17536.5 (West 1997).

[11] Cal. Stats. 1933, ch. 953, § 1, at 2482 (amending former Cal. Civ. Code § 3369, the forerunner to current Cal. Bus. & Prof. Code § 17203, regarding unfair trade practices including false advertising).

[12] Cal. Stats. 1972, ch. 244, § 1, at 494, amending false advertising law.

constitutional arguments. The free speech clause of the California Constitution has long been interpreted to be "broader and more protective than the free speech clause of the First Amendment." *See, e.g., Los Angeles Alliance For Survival v. City of Los Angeles*, 993 P.2d 334, 342 (Cal. 2000). Consequently, if Nike had a meritorious argument, it might have been resolved on adequate state grounds.

B. Statutes Providing Remedial Actions To Prevent The Dissemination Of Deceptive Advertising Do Not Chill First Amendment Rights

1. False Advertising Law Is Not Subject To An Over Breadth Challenge

In its second question presented to this Court, Nike assumes that the California Supreme Court properly characterized Nike's speech as commercial speech and argues that, if so, "speakers" in general would be unduly chilled from engaging in commercial speech in derogation of the First Amendment. Pet. Br. i, 38 (asserting decision below imperils commercial entities throughout the world). Assuming as Nike does that this is a commercial speech matter, an over breadth challenge must founder: "it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the over breadth doctrine does not apply to commercial speech." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 496-97 (1982) *citing Central Hudson*, 447 U.S. at 565, n.8.

2. The Challenged Statute Is A Reasonable Remedy For Addressing Deceptive Advertising By Commercial Enterprises

California, along with 43 other states and the District of Columbia, has adopted a version of the 1911 Printer's Ink model false advertising statute that prohibits any person from disseminating untrue or misleading statements which the person knows, or by the exercise of reasonable care should know, to be untrue or misleading, with the intent to dispose of property or services. Cal. Bus. & Prof. Code § 17500 (West 2003); Pet. App. at 87a-88a; *see People v. Superior Court*, 157 Cal.Rptr. 628, 634, n.7 (Cal. Ct. App. 1979). In addition, "unfair competition" is defined to include violations of Bus. & Prof. Code § 17500 and unfair, deceptive, untrue, or misleading advertising. Cal. Bus. & Prof. Code § 17200 (West 2003); Pet. App. at 83a. Although the advertising prong of the unfair competition definition appears broader than the false advertising prohibition of § 17500, both statutes have been interpreted to provide similar protection against false advertising. *See Committee on Children's Television*, 673 P.2d at 668 ("we discern no difference in the scope of these enactments . . . or the meaning of their provisions."). Both statutes have been construed to apply only to commercial speech and not to speech like political advertising that has been traditionally subject to core First Amendment protection. *See O'Connor v. Superior Court*, 223 Cal.Rptr. 357 (Cal. Ct. App. 1986).

Any person may bring an action on behalf of the general public to remedy false advertising violations. Cal. Bus. & Prof. Code §§ 17203, 17204, 17535 (West 1997); Pet. App. 83a-84a, 88a. A plaintiff's ability to bring an action for the general public is not conditioned on having suffered direct injury. The court, however, can dismiss the action if the "defendant can demonstrate a potential for

harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties. . . ." *Kraus*, 999 P.2d at 733. The creation of a role for a private attorney general "is not uncommon in modern legislative programs" to augment the limited resources of government agencies in implementing important legislative policy. *See Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). Indeed, it has been long recognized as a matter of state practice that "A stated number of citizens or a single individual may be clothed by the Legislature with authority to invoke the aid of courts in the suppression of violations of law." *Barrows v. Farnum's Stage Lines, Inc.*, 150 N.E. 206, 208 (Mass. 1926).[13] Moreover, "experience demonstrates consumers are generally among the best vindicators of the public interest," and courts have allowed their participation as private attorneys general. *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994, 1002-06 (D.C. Cir. 1966) (Burger, Circuit Judge [later Chief Justice]).

Although standing under the challenged advertising statute is broad, potential relief is narrow. The court "may" issue an injunction and "may make such orders . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such" violation. Cal. Bus. & Prof. Code §§ 17203, 17535. Neither injunctive nor restitutionary relief is required, and the trial court must permit the

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[13] Qui tam actions, in which a private party is authorized to pursue a penalty against the violator of a law although the party is personally unharmed by the violation, "have been in existence for hundreds of years in England, and in this country since the foundation of our Government." *Marvin* v. *Trout*, 199 U.S. 212, 225 (1905).

defendant to offer equitable considerations that must be considered in mitigating or declining discretionary equitable relief. *See Cortez v. Purolator Air Filtration Products Co.*, 999 P.2d 706, 717 (Cal. 2000).

A private plaintiff may not recover any damages for himself or anyone else. *See, e.g., Bank of the West v. Superior Court*, 833 P.2d 545, 557 (Cal. 1992); *Chern v. Bank of America*, 544 P.2d 1310, 1315 (Cal. 1976). Punitive damages are foreclosed. *See People v. Superior Court*, 507 P.2d 1400, 1402-03 (Cal. 1973). Civil penalties can only be recovered by designated public prosecutors. *See* Cal. Bus. & Prof. Code §§ 17206 (West 2003), 17536 (West 1997); Pet. App. 84a-85a. Other than restitution for the direct victims from whom money or property was taken, a private plaintiff cannot obtain the disgorgement of the profits or benefits the defendant obtained from false advertising. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 2003 Lexis 1301, *5 (Cal. 2003); *Kraus*, 999 P.2d at 728, 732. Significantly, no statute provides for the award of attorney's fees in false advertising cases; thus, even a prevailing private plaintiff has no right to recover attorney's fees. *See Shadoan v. World Sav. & Loan Assn.*, 268 Cal.Rptr. 207, 212 n.7 (Cal. Ct. App. 1990). A court, however, may make a discretionary award of attorney's fees but only if the action resulted in the enforcement of an important right affecting the public interest, a significant benefit was conferred on the general public or a large class of persons, the necessity and financial burden of private enforcement make an award appropriate, and such fees should not in the interest of justice be paid out of any recovery. Cal. Code Civ. Proc. § 1021.5 (West 2003).

Moreover, California has established a procedure at the early stage of litigation to weed out baseless cases burdening free speech. A defendant may bring, within 60 days of service, a special motion to strike a complaint

arising from the defendant's constitutionally-protected speech. Cal. Code Civ. Proc. § 425.16(b)(1), (f) (West 2003). Protected speech activity includes commercial speech like advertising, marketing, and public relations. *DuPont Merck Pharmaceutical Co. v. Superior Court*, 92 Cal.Rptr.2d 755, 758-59 (Cal. Ct. App. 2000). The defendant need not establish that the action had the purpose or effect of chilling speech. *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 52 P.3d 685, 687 (Cal. 2002); *City of Cotati v. Cashman*, 52 P.3d 695 (Cal. 2002). All discovery proceedings are stayed until the motion is determined. Cal. Code Civ. Proc. § 425.16(g). The motion is considered on the basis of the pleadings and affidavits. *Id.* § 425.16(b)(2).

If the defendant establishes that the case arises from protected speech activity, the plaintiff must then establish the probability of prevailing. *Id.* § 425.16(b)(1); *Equilon,* 52 P.3d at 691, 694. The plaintiff must show that the "complaint both is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002).

A prevailing defendant is entitled to recover attorney's fees and costs, but a prevailing plaintiff is only entitled to recover those fees and costs if the special motion to strike is frivolous or brought for delay. Cal. Code Civ. Proc. § 425.16(c). Either party may pursue an interlocutory appeal of the trial court's decision, the effect of which is to stay proceedings until the appeal is determined. *Id.* §§ 425.16(j), 916(a). This statutory scheme thus "provides an efficient means of dispatching, early on in the lawsuit, and discouraging, insofar as fees may be shifted, a plaintiff's meritless claims." *Equilon*, 52 P.3d at 691. The California legal regime, thus, does not foster runaway

litigation creating any chilling effect on speech and, indeed, has significant limiting features.

3. Actions For Discretionary Equitable Relief Do Not Impermissibly Chill First Amendment Rights When They Are Directed To False Statements About The Defendant's Own Commercial Operations

Nike and the United States insist that this Court's defamation jurisprudence requires that privately-filed false advertising cases cannot constitutionally proceed without proof of both damage and actual malice or some other high level of scienter. They reason that without some tolerance for false advertising that does not meet these exacting standards, commercial speech may be chilled. This argument, however, is fundamentally inconsistent with the commercial speech doctrine.

This Court has long recognized that:

> there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); *accord Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to

be effected."). Accordingly, the false statement of fact "has never been protected for its own sake." *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

Nonetheless, since "erroneous statement is inevitable in free debate," some false statements *about others* must be tolerated to promote free discussion; consequently, the courts have tempered the libel laws to permit a measure of falsity to ensure that "the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times*, 376 U.S. at 271-72. The level of tolerance varies depending on whether the defamed person is a public or private figure and whether the context is public or private. *See New York Times,* 376 U.S. at 279-80; *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz*, 418 U.S. at 347, 349-50; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

If Nike had defamed the labor practices of a competitor like Reebok or Adidas, the maligned competitor could bring an action for defamation under the rules described above. *See* 2 HARPER, JAMES & GRAY, THE LAW OF TORTS (2d ed. 1986), § 5.3, at 45 (a corporation may "maintain an action for defamation for language that tends to discredit it and to injure its business reputation."); *accord* Restatement (Second) of Torts § 561(a). Likewise, Nike's critics may be liable if they defamed Nike under the rules applicable to defamation actions.

The self-censorship issue at work in the libel cases has no bearing in the factual context pleaded in the case at bar. Erroneous statement is not inevitable when a company speaks of itself in promoting its products and corporate image or touting the conditions under which its products are manufactured. Noting the "commonsense" difference between commercial and noncommercial speech and distinguishing *New York Times*, this Court observed that:

> The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Va. State Bd. of Pharmacy, 425 U.S. at 772 n.24.

Emphasizing this point in his concurrence, Justice Stewart recognized that although some "breathing space" for free expression necessitated limitations on recovery for libel,

> The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction 'some falsehood in order to protect speech that matters.' [*Gertz,* 418 U.S.] at 341.

Va. State Bd. of Pharmacy, 425 U.S. at 777-78 (Stewart, J., concurring).

The California Supreme Court's opinion follows this teaching. As the Court observed,

> In speaking to consumers about working conditions in the factories where its products are made, Nike engaged in speech that is particularly hardy or durable. Because Nike's purpose in making these statements, at least as alleged in the first amended complaint, was to maintain its sales and profits, regulation aimed at preventing false and actually or inherently misleading speech is unlikely to deter Nike from speaking truthfully or at all about the conditions in its factories.

Kasky, 45 P.3d at 258. Recognizing the importance to consumers of information about the circumstances in which products are manufactured, the *Kasky* court concluded that to the extent the false advertising laws caused Nike to increase its effort to verify the truth of its statements, state law served the purpose of commercial speech protection by "'insuring that the stream of commercial information flow[s] cleanly as well as freely.'" *Ibid.*, *citing Va. State Bd. of Pharmacy*, 425 U.S. at 772.

CONCLUSION

For the foregoing reasons, the California Supreme Court correctly concluded that the First Amendment does not protect a company's dissemination of allegedly false statements of objective, verifiable facts about the company's products and business operations as part of a publicity campaign intended to encourage consumption of its products. False commercial speech "may be prohibited entirely." *See In re RMJ*, 455 U.S. 191, 203 (1982) and

cases cited in Section I(C)(1), above. To facilitate the elimination of false commercial speech, the state may constitutionally permit private parties to seek limited equitable redress. Accordingly, the judgment should be affirmed.

DATED: April 4, 2003

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